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No. 10-920

In the Supreme Court of the United States

ANA ROSA OCHOA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred by holding—consistent with two other circuits and in conflict with at least three other circuits—that federal courts are categorically incompetent to review a Board of Immigration Appeals decision denying a motion to reopen removal proceedings *sua sponte*, even where that decision applies a legal standard, on the ground that such decisions are "committed to agency discretion by law."

2. Whether the Eighth Circuit erred by disregarding the BIA's stated grounds for its decision, in conflict with *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and the decisions of other circuits.

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OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 604 F.3d 546 and is reproduced at App.1a-14a. The opinion of the Board of Immigration Appeals is reproduced at App.28a-31a.

JURISDICTION

A divided panel denied rehearing on August 27, 2010, and rehearing en banc was denied on September 17, 2010. Justice Alito extended the time for filing this petition to and including January 18, 2011. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND REGULATIONS

Chapter 7 of the Administrative Procedure Act ("APA"), is titled "Judicial Review" and provides in relevant part:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. §701(a)(1)-(2).

The text of the relevant regulatory provisions is reproduced in the Appendix at App.20a.

STATEMENT OF THE CASE

This case involves Ana Ochoa's timely motion to reopen her removal proceedings, on the ground that evidence critical to her application for immigration relief was omitted because of her former counsel's ineffective assistance. The Board denied that motion on the merits, and the Eighth Circuit refused to review the Board's decision. Finding BIA's treatment of

Ochoa's motion "unclear," the court proceeded to interpret the motion for itself, and somehow concluded that Ochoa's concededly timely motion to reopen was actually a limited request that BIA exercise its discretionary authority to reopen "*sua sponte*." Indeed, the court of appeals made quite clear that it would have recharacterized the motion as one seeking *sua sponte* relief even if the Board had clearly treated it as one filed as of right. The court's assertion of authority to affirm an agency based on a rationale not stated by the agency—and even a rationale affirmatively rejected by the agency—violates bedrock principles of administrative law under *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and its progeny.

Having construed the motion as one requesting that the Board reopen "*sua sponte*," the court proceeded to hold that such decisions are categorically immune from judicial review under the APA because they are "committed to agency discretion by law," even though the Board's decision in this case turned on its application of familiar (and frequently reviewed) legal standards concerning ineffective assistance of counsel. That aspect of the Eighth Circuit's decision deepens an intractable circuit split on the reviewability of Board decisions denying motions to reopen *sua sponte*, an important and recurring question of law. It is also plainly wrong. If it were correct, then this Court's recent decision in *Kucana v. Holder*, 130 S.Ct. 827 (2010), was merely a rhetorical exercise. Although this Court in *Kucana* decided only that IIRIRA is no bar to judicial review of BIA's reopening decisions, the logical consequence of the Eighth Circuit's decision is that the Board's decision in that case was nevertheless

unreviewable for a different reason—*i.e.*, that it was committed to agency discretion under the APA.

Statutory and Regulatory Framework

Under Section 240A(b) of the Immigration and Nationality Act ("INA"), an otherwise removable alien may nevertheless avoid deportation if she qualifies for cancellation of removal. To qualify for cancellation of removal, an alien must demonstrate: (1) physical presence in the United States for a continuous period of not less than ten years immediately preceding the date of the application; (2) good moral character during that period; (3) that she has not been convicted of a disqualifying offense; and (4) that the removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States." 8 U.S.C. §1229b(b)(1)(D).

An alien may file, as of right, one motion to reopen removal proceedings within ninety days of a final administrative decision by the Board of Immigration Appeals ("BIA" or "Board"). *See* 8 U.S.C. §1229a(c)(7); *see also* 8 C.F.R. §1003.2(c)(2). Attorney General regulations provide that the BIA also "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." 8 C.F.R. §1003.2(a). That same regulation provides that "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." *Id.*

Facts and Procedural History

Ms. Ochoa is a native and citizen of Mexico who entered the United States in 1991 and has since resided

principally in Marshalltown, Iowa. A.R.138.[1] She and her husband have two United States citizen children, Viridiana and Guillermo, and another son, Cesar, whom they brought to the United States as an infant. *Id.*; App.24a.

In 2004, after Ochoa had lived in the United States for almost 14 years, the government commenced removal proceedings against her. Ochoa admitted the government's factual allegations and conceded removability, but applied for cancellation of removal and, in the alternative, voluntary departure, under INA §§240A(b)(1) and 240B(b).

At a hearing on her applications before an Immigration Judge ("IJ"), Ochoa testified that her son Guillermo, then seven years old, suffered from medical problems caused by lead poisoning when he was two years old. A.R.168-69. Ochoa's then-counsel, Mr. Ta-Tu Yang ("Yang"), declared that Guillermo's condition was "new to [him]" and requested additional time to secure and submit related evidence. A.R.175. The IJ deferred ruling on Yang's request. A.R.175-76. When the IJ asked Ochoa why she had not previously discussed Guillermo's condition with her attorney, she explained that she did not "think it was necessary." A.R.187.

The government opposed Yang's request for additional time to submit corroborating evidence. The government attorney remarked that "a medical problem" is "one of the *prime pieces of evidence* to show hardship" for a cancellation application, and that it "should have been fully inquired on a number of

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[1] "A.R." refers to the Administrative Record, No. A79-587-385 filed with the BIA.

different ways when the case was being prepared." A.R.188 (emphasis added). The IJ agreed, observing that "these are things that are so material and so central to the claim that [they] ... should have been advanced earlier." A.R.189. The IJ then denied counsel's request for additional time to submit corroborating evidence of Guillermo's disability. A.R.189-90.

The IJ found that Ochoa had good moral character, continuous physical presence in the United States for more than ten years, and no criminal record, thus satisfying three of the four eligibility criteria for cancellation of removal. A.R.202. The IJ further acknowledged Board precedent indicating that Ochoa would have been a "'strong applicant'" for cancellation of removal if she had demonstrated that she had a "'child with very special health issues, or compelling special needs in school.'" A.R.204 (quoting *Matter of Monreal*, 23 I.&N. Dec. 56, 63 (B.I.A. 2001)). The IJ determined, however, that "[t]he record does not compel the conclusion ... that [Ochoa] has demonstrated that her removal would create exceptional and extremely unusual hardship" for Guillermo. *Id.* That was so, the IJ explained, because Ochoa had "not submitted any evidence to either corroborate" her testimony regarding Guillermo's needs and disabilities "or to develop them as exceptional and extremely unusual hardship factors." A.R.205. The BIA affirmed. A.R.206.

After obtaining new counsel, and well within the ninety-day deadline prescribed by 8 C.F.R. §1003.2(c), Ochoa filed a motion to reopen based on the ineffective assistance of her prior counsel. *See* App.22a-27a. The motion referred to 8 C.F.R. §1003.2(a), which sets forth "[g]eneral" provisions governing such motions and also

provides that BIA may reopen a case "at any time" in response to party's motion or "on its own motion." App.20a. Ochoa's motion stated that she "ha[d] satisfied the requirements set by the Board of Immigration Appeals for filing a motion to reopen based on an ineffective assistance of counsel claim pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)." App.23a. The motion explained that Ochoa's former attorney had failed to elicit key information and compile corroborating evidence related to her son's disability, and that she was prejudiced by her attorney's deficient performance. App.26a. Her motion also contained a grammatically confused request "that the Board of Immigration Appeals (BIA) this case on their own motion to Reopen." [Sic.] App.10a.

In support of her motion, Ochoa submitted a bar complaint she had filed against her prior counsel and an affidavit describing his deficient handling of her case, in accordance with 8 C.F.R. §1003.2(c)(1) and *Lozada*. Ochoa also tendered evidence regarding the effects of Guillermo's lead poisoning, including medical records documenting his diagnosis and treatment; evidence of his resulting learning disabilities; and evidence regarding the disadvantages faced by special education students in Mexico. *See* A.R.55-135.

The Board found that Ochoa's motion to reopen her removal proceedings was "timely." App.28a. It also acknowledged that Ochoa had "complied with the requirements set forth in *Matter of Lozada*" and confessed to being "troubled by evidence indicating that [Guillermo] suffered from educational problems stemming from ... lead poisoning at the age of two." App.29a-30a. But the Board nonetheless denied Ochoa's motion on the merits, concluding summarily

that she had failed to demonstrate ineffective assistance of counsel. The Board noted Ochoa's admission "that she did not think the lead poisoning issue was necessary to her case" and evidence that Guillermo's "lead levels have diminished" and were now "in the normal range." *Id.* The Board did not acknowledge Ochoa's evidence that learning disabilities from lead poisoning persist notwithstanding diminished lead levels in the body, and never addressed Ochoa's contention that counsel had an obligation to advise and inquire about matters relevant to her application, including her children's medical conditions.[2]

Having rejected her ineffective assistance claim, the Board concluded that Ochoa had failed to demonstrate that "the new evidence presented" could not have been presented at her earlier hearing, as required by 8 C.F.R. §1003.2(c)(1), which governs motions to reopen by a party. App.29a.

Ochoa filed a petition for review in the Eighth Circuit, arguing that the BIA abused its discretion in denying her motion to reopen. But a divided panel refused to review the BIA's action—for abuse of discretion or otherwise. The panel majority

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[2] In response to Ms. Ochoa's complaint against Yang, the Iowa Supreme Court Board of Professional Ethics and Conduct stated that her allegations, if true, "perhaps would be 'ineffective assistance of counsel,'" but because they were not sufficiently egregious "to warrant a disciplinary sanction for ethical misconduct," the Board declined to take further action. Petitioner's Br. at 21-22 (8th Cir. Jan. 28, 2008); *id.* at Exhibit. 3. It is a matter of public record that Mr. Yang *has* been officially reprimanded by the Board for neglect of a client's immigration matter on at least one occasion. *Iowa Supreme Court Board of Professional Ethics and Conduct v. Ta-Tu Yang*, No. 02-0087, Order of Public Reprimand (Feb. 26, 2002).

acknowledged that the BIA "may have treated Ochoa's motion" as one filed by a party as of right "under the rubric of 8 C.F.R. §1003.2(c)," a treatment that would have been reviewable under *Kucana* and longstanding 8th Circuit precedent. But the panel majority nonetheless construed Ochoa's motion for itself and concluded that the motion was best interpreted as a request that the BIA reopen the case "*sua sponte* ... under §1003.2(a)." App.6a. On that basis the panel majority held that it was precluded from reviewing the BIA's order denying the motion, under pre-*Kucana* circuit precedent holding that decisions not to reopen removal proceedings *sua sponte* are "committed to agency discretion by law" under 5 U.S.C. §701(a)(2). App.6a-7a. "[W]e see no way around *Tamenut* [*v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008) (en banc)], given Ochoa's express reliance on §1003.2(a) ...." App.8a. Because it relied on what it viewed as a categorical exclusion from judicial review, the panel majority never considered the fact that the BIA's decision in this case turned on a familiar—and routinely reviewed—ineffectiveness-of-counsel inquiry.

Judge Colloton dissented in part. App.8a-14a. The task of the federal court, he explained, is to "review the BIA's decision, not Ochoa's motion." App.11a. Although Ochoa's motion cited 8 C.F.R. §1003.2(a), and did not explicitly invoke 8 C.F.R. §1003.2(c), the BIA had "clear[ly]" (and correctly) treated the motion as one by a party. *Id.* For example, the BIA had explicitly found the motion "timely"—which makes sense only if the motion is one by a party—and had explicitly applied the legal standard applicable to party-filed motions to reopen. *Id.* Indeed, "[t]here is not even a hint in the BIA's decision ... that it

considered whether to exercise its 'limited discretionary powers' to reopen cases on its own motion." *Id.* Accordingly, Judge Colloton concluded that the BIA had properly reached the merits of Ochoa's timely motion, and the Eighth Circuit therefore had a responsibility to review the BIA's denial of that motion under the familiar abuse-of-discretion framework. App.11a-12a. Moreover, Judge Colloton observed, "[t]he Attorney General recognize[d] that the agency's decision on the motion to reopen is judicially reviewable" and the government "concede[d] that [the court] should review [it] for abuse of discretion." App.11a.

Turning to the merits, Judge Colloton determined that the BIA's decision must be vacated for "fail[ure] to give a rational and reasoned explanation for its decision." App.12a. "The BIA's cursory decision on Ochoa's motion cannot withstand even this deferential review," he concluded, because it was "not responsive to Ochoa's argument that [her] counsel had a professional obligation to *inquire* about matters that would assist in making a case for cancellation of removal, and that counsel should have *elicited* the information about lead poisoning from Ochoa." App.13a. The BIA also neglected to address "whether it believed that differences between special education services available in Mexico and in the United States would amount to 'exceptional and extremely unusual hardship' for [Guillermo] if his mother were removed to Mexico." *Id.* Because the BIA "failed to render a reasoned decision," Judge Colloton would have "remand[ed] the case for further proceedings with respect to Ochoa's claim of ineffective assistance of counsel." *Id.*

Ochoa sought panel rehearing and rehearing en banc, arguing that the panel had erred in determining that her timely motion to reopen was actually a request that BIA reopen the case on *its own* motion, and by construing Ochoa's motion independently rather than reviewing the BIA's resolution of that motion on its own terms, as required by *Chenery*. Pet'n for Reh'g or Reh'g En Banc at 6-9 (8th Cir. July 26, 2010). Ochoa further argued that this Court's recent decision in *Kucana* undermined the Eighth Circuit precedent holding that BIA decisions not to reopen a case *sua sponte* are "committed to agency discretion by law" and thus shielded from judicial scrutiny. *Id.* at 12-15.

In response, the government conspicuously declined to defend the panel's characterization of the BIA's decision, stating only that "*to the extent that* the panel accurately determined that Ochoa filed a motion to reopen requesting that the Board reopen sua sponte, the panel did not err in applying" circuit precedent. Opp. to Pet. for Reh'g at 2, 4 (8th Cir. Aug. 19, 2010) ("Reh'g Opp.") (emphasis added). The government did not address Ochoa's argument that the panel's decision contravened *Chenery*. The panel denied rehearing. App.17a.

Judge Colloton dissented from the denial of panel rehearing. He took the government to task for "utterly fail[ing] to address" the "lead argument in Ochoa's petition for rehearing"—"that the panel erred by mischaracterizing the BIA's action on Ochoa's motion to reopen as a refusal to act *sua sponte*, rather than as a denial of a timely motion to reopen filed by a party." *Id.* "Because the government acknowledged in its brief on appeal that the BIA's decision is reviewable for abuse of discretion, and then declined in its response to the petition for rehearing to defend the key premise of

the panel's decision," he would have granted panel rehearing. *Id.* The court of appeals denied rehearing en banc. App.18a.

REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit held that BIA's decision denying Ochoa's motion to reopen was "committed to agency discretion by law" under §701(a)(2). It held that review was barred categorically because the motion was one to reopen *sua sponte*, even though the BIA's decision in this case turned on its application of legal standards, and not the sort of weighing of policy and other factors that is characteristic of a purely discretionary decision. The Eighth Circuit thereby aligned itself with the Fourth and Sixth Circuits in conflict with decisions of at least three other courts of appeals.

The Eighth Circuit's holding rests principally on the fact that the relevant regulation, "8 C.F.R. §1003.2(a), provides no guidance as to the BIA's appropriate course of action ... and specifies no standards for a court to use to cabin the BIA's discretion." That holding cannot be reconciled with this Court's precedents. In *Kucana*, this Court held that the jurisdiction-stripping provision of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 8 U.S.C. §1252(a)(2)(B)(ii), does not preclude review of a BIA decision denying a party's motion to reopen removal proceedings. The Court rejected the argument that such decisions are made "discretionary" under IIRIRA via the Attorney General's regulations. In so holding, this Court reaffirmed the strong presumption in favor of judicial review and emphatically rejected the notion that "the Executive [has] a free hand to shelter its own decisions

from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" 130 S.Ct. at 840. Section 1003.2(a), the regulation on which the Eighth Circuit relied in this case is the very same regulation that was the focus of this Court's analysis in *Kucana*. If the Eighth Circuit were correct therefore, this Court's decision in *Kucana* was an empty exercise, for the BIA's denial of the motion at issue in *Kucana* itself would be "committed to agency discretion by law" and immune from judicial scrutiny. Nothing in this Court's decision suggests that result. To the contrary, this Court noted the long history of federal appellate-court review of such decisions and refused to ascribe to Congress an intent to strip the courts of that historically-exercised jurisdiction.

Nevertheless, because *Kucana* specifically reserved judgment as to whether §701(a)(2) prevents review of BIA decisions denying a request that it reopen *sua sponte*, *see Kucana*, 130 S.Ct. 839 n.18, the lower courts have resisted even the most forceful invitations to revisit pre-*Kucana* circuit precedent applying §701(a)(2) to bar judicial review of agency decisions deemed discretionary by regulation—even though their reasoning cannot be reconciled with *Kucana* or the *Heckler* line of cases construing §701(a)(2)'s narrow scope.

The question whether BIA's "*sua sponte*" decisions are categorically unreviewable is recurring and important, affecting the proper balance between the Executive and the Judiciary. The disagreement among the courts of appeals on this issue also reflects a broader, longstanding confusion among the courts of appeals concerning the scope of §701(a)(2). This

Court's intervention is necessary to resolve the circuit conflict and provide needed guidance to the lower courts on the limitations of §701(a)(2) more generally. And this case provides an appropriate vehicle for that review. Had this case arisen in the First, Second, or Third (and likely the Seventh) Circuits, Ochoa's petition for review would have been entertained on the merits. This Court should grant the Petition to resolve the circuit split and ensure uniformity with its decisions.

2. The decision below also conflicts squarely with this Court's decision in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and the decisions of other courts of appeals faithfully applying *Chenery*. The court acknowledged that the BIA "may have treated Ochoa's motion under the rubric of 8 C.F.R. §1003.2(c)," which governs timely motions by a party, because "BIA noted that Ochoa's motion is 'timely,' a determination pertinent under §1003.2(c)," and "used *Matter of Coelho* ... as its governing legal standard in evaluating Ochoa's evidence." App.6a. But it somehow concluded, nevertheless, that "the Board's treatment of the motion [wa]s unclear...." *Id.* Without deciding how the BIA actually treated Ochoa's motion, the court of appeals proceeded to construe the motion for itself, and determined that Ochoa's failure to cite §1003.2(c), coupled with her use of the phrase "*sua sponte*," transformed her concededly timely motion to reopen into a limited request for *sua sponte* reopening. Indeed, the court made clear that it would have recharacterized Ochoa's motion, just the same, had BIA clearly treated it as a timely motion by a party.

That utter disregard for the BIA's treatment of Ochoa's motion flies in the face of this Court's

admonition in *Chenery* that the propriety of agency action must be evaluated based on the rationale proffered by the agency itself. If the basis for an agency's decision is "unclear," this Court's precedents dictate that the proper course is a remand to the agency for further explanation. A court of appeals "is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). The court of appeals' error on this score is sufficiently plain and egregious that summary reversal is warranted. *See, e.g., INS v. Ventura*, 537 U.S. 12, 16 (2002).

Summary reversal on this issue is especially appropriate because the panel majority's construction of Ochoa's motion is utterly implausible, and it served to deprive Ochoa of the judicial review to which she is entitled. The government had no trouble deciphering what was clear as day on the face of the BIA's decision—that Ochoa's motion to reopen was a timely motion by a party, and that BIA's decision to deny it was therefore (uncontroversially) subject to judicial review under the familiar abuse-of-discretion framework. *See* Resp't Br. at 8 (8th Cir. Mar. 31, 2010). Indeed, when asked for a response to Ochoa's petition for rehearing, the government could not bring itself to defend this aspect of the panel's decision. *See* Reh'g Opp. at 2, 4; App.8a (Colloton, J., dissenting from denial of panel rehearing).

The Petition should be granted, and the case should be set for briefing and argument or summarily reversed.

I. THE EIGHTH CIRCUIT'S DECISION DEEPENS AN ENTRENCHED CIRCUIT CONFLICT ON WHETHER BIA DECISIONS DENYING MOTIONS TO REOPEN *"SUA SPONTE"* ARE CATEGORICALLY UNREVIEWABLE

Under §701(a)(2) of the APA, federal courts may not review agency action "committed to agency discretion by law." How to determine whether final agency action falls within that bar on judicial review is the subject of considerable debate among the lower courts.

This Court has held that §701(a)(2) "is a very narrow exception ... applicable in those rare instances where 'statutes are drawn in such broad terms that in any given case there is no law to apply,'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 79-752 at 26 (1945)), or where there are no "meaningful standard[s] against which to judge the agency's exercise of discretion," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). This Court explained in *Heckler* that §701(a)(2) imports pragmatic, "common law" principles governing the judicial review of agency action. *Id.* at 831-33. A court determining whether agency action is "committed to agency discretion by law" must consider whether that action is of a type that "tradition, case law, and sound reasoning" would place beyond judicial scrutiny. *Id.* at 831.

Here, having determined that Ochoa's motion to reopen was solely a request for BIA to reopen her case *sua sponte*, the Eighth Circuit held that BIA's decision was "committed to agency discretion by law" under §701(a)(2). The court held that review is precluded

categorically when the BIA addresses motions to reopen *sua sponte*, and it therefore never considered that the BIA's denial of reopening in this particular case turned on the application of familiar legal standards rather than a weighing of policy or other factors that are characteristic of purely discretionary decisions. In so holding, the Eighth Circuit aligned itself with the Fourth and Sixth Circuits in conflict with decisions of at least six other courts of appeals. Had this case arisen in any of those other circuits, Ochoa's petition for review would have been entertained on the merits. This threshold jurisdictional question is a recurring one of great significance, and this Court's precedents cast serious doubt on the Eighth Circuit's holding. This Court should grant this Petition to resolve the circuit split and ensure uniformity with its decisions.

A. The Decision Below Deepens An Entrenched Circuit Conflict Concerning Whether BIA's Denial Of A Motion To Reopen *Sua Sponte* Is Categorically Exempt From Judicial Review

In *Kucana*, this Court expressly reserved the question of whether a denial of a motion to reopen *sua sponte* is "committed to agency discretion by law," observing that eleven courts of appeals had so concluded. *Kucana*, 130 S.Ct. at 839 n.18. Although perhaps superficially aligned, the courts of appeals had in fact adopted materially different approaches to the §701(a)(2) question where, as here, the agency's decision turns on questions of law. The lower courts' division has persisted after *Kucana*, and the

entrenched circuit conflict warrants this Court's immediate intervention.

With the decision below, the Eighth Circuit has joined the Fourth and Sixth Circuits in holding that review is never available for denials of *sua sponte* reopening—even in cases, like this one, that involve questions of law. *Mosere v. Mukasey*, 552 F.3d 397, 400 (4th Cir. 2009) (stating categorically that there is no jurisdiction to review *sua sponte* denials of reopening); *Gor v. Holder*, 607 F.3d 180, 187 (6th Cir. 2010) (same).

At least three other circuits (the First, Second, Third) have held that review of such decisions *is* available in cases where the BIA decision rests on a legal determination, and another (the Seventh) has strongly indicated that it shares that view. *See Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009) ("[W]here the Agency may have declined to exercise its *sua sponte* authority because it misperceived the legal background ..., remand to the Agency for reconsideration in view of the correct law is appropriate."); *Duarte-Ceri v. Holder*, 2010 WL 4968689, at *2 (2d Cir. 2010) (same); *Luis v. INS*, 196 F.3d 36, 41 (1st Cir. 1999) (due process claim reviewable under *Heckler* even though BIA's decision not to reopen *sua sponte* generally is not); *Cruz v. Attorney General*, 452 F.3d 240, 250 (3d Cir. 2006) (dividing denials of *sua sponte* reopening into two categories, "unreviewable decision[s] to grant discretionary relief and reviewable decision[s] that alien is legally *ineligible* for discretionary relief") (citing *Pinho v. Gonzalez*, 432 F.3d 193 (3d Cir. 2005) (emphasis added)); *see also Cevilla v. Gonzales*, 446 F.3d 658, 660-61 (7th Cir. 2006) (Posner, J.) ("no law to apply" doctrine bars review only when "the Board's

order that was sought to be reviewed was indeed based on an exercise of uncabined discretion rather than on the application of a legal standard"; in any event, the doctrine "has been superseded in the immigration context" by the INA), *cert. denied*, 552 U.S. 826 (2007); *Munoz de Real v. Holder*, 595 F.3d 747, 750 (7th Cir. 2010) (reviewing BIA's refusal to reopen *sua sponte* for abuse of discretion).[3]

This circuit conflict has persisted since *Kucana* and shows no signs of abatement. Several circuits have explicitly declined to revisit their *sua sponte* reopening precedents in light of *Kucana*. *See* App.6a n.3 (*sua sponte* decisions categorically unreviewable even after *Kucana*); *Gor*, 607 F.3d at 197 (*en banc* court declined to revisit circuit precedent in light of *Kucana*, despite panel opinion urging court to do so); *Neves v. Holder*, 613 F.3d 30, 35 (1st Cir. 2010) (concluding, on remand from this Court in light of *Kucana*, that *Kucana* "does not affect" circuit precedent concerning the

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[3] Although the Eighth Circuit remarked in dicta in *Tamenut* that federal courts "generally do have jurisdiction over any colorable constitutional claim," 521 F.3d at 1005, it did not have to reach that question because it found that Tamenut had not raised such a claim. And the circuit precedent cited in *Tamenut* for this proposition did not involve a motion to reopen (*sua sponte* or otherwise). Nor does *Tamenut*'s holding carve out an exception for review where the BIA has decided other questions of law. Thus, the Eighth Circuit's holding in this case—that it may not review for abuse of discretion BIA's rejection of Ochoa's ineffective assistance claim—aligns the Eighth Circuit with the Sixth and Fourth, against the weight of authority.

The Fifth Circuit appears to have taken yet a third approach, reviewing such decisions only when they raise a colorable constitutional claim. *See Nawaz v. Holder*, 314 F. App'x 736, 737 (5th Cir. 2009).

reviewability of BIA decisions on motion to reopen *sua sponte*); *Gashi v. Holder*, 382 F. App'x 21, 23 (2d Cir. 2010) (Because *Kucana* "declined to reach the issue," circuit precedent "remains good law."); *Oziry v. Attorney Gen*, No. 09-3828, 2010 WL 3920522, at *2 (3d Cir. 2010) (same); *Jaimes-Aguirre v. U.S. Attorney Gen.*, 369 F. App'x 101, 103 (11th Cir. 2010) (same). Notably, in *Neves*, the government had "recommended that the case be granted, vacated, and remanded in light of *Kucana*," 613 F.3d at 33, and this Court obliged, *Neves v. Holder*, 130 S.Ct. 3273 (2010).

Because BIA's decision denying Ms. Ochoa's motion to reopen was based on the agency's legal conclusions that Ochoa had not demonstrated ineffective assistance of counsel and had not satisfied 8 C.F.R. §1003.2(c), her petition for review would have been considered on its merits in the majority of circuits that have addressed the issue. This Court should grant the Petition to resolve the circuit conflict.

B. The Eighth Circuit's Holding Cannot Be Reconciled With This Court's Precedents

In *Tamenut v. Mukasey*, relied on by the court of appeals in this case, the BIA had denied Tamenut's untimely motion to reopen removal proceedings, which invoked BIA's authority to "reopen ... on its own motion," "at any time," "any case in which it has rendered a decision." 8 C.F.R. §1003.2(a); *see* 521 F.3d at 1002.[4] The BIA had "acknowledged it retained

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[4] Two separate panels of that court had previously concluded that it did not, *Recio Prado v. Gonzales*, 456 F.3d 819, 821-22 (8th Cir. 2006), and *Ghasemimehr v. Gonzales*, 427 F.3d 1160, 1162 (8th Cir. 2005).

'limited discretionary powers' under §1003.2(a) to reopen proceedings on its own motion, but stated that this power is confined to 'exceptional situations,' and concluded that Tamenut's situation did not merit this relief." *Tamenut*, 521 F.3d at 1002.

Addressing its jurisdiction, the Eighth Circuit concluded that IIRIRA's jurisdiction-stripping provision did not preclude review. *Id.* at 1003. The court perceived "*no[] material difference*" in that regard "between the BIA's decision to deny a party's motion to reopen and the BIA's decision to refuse a party's request that the agency reopen proceedings on its own motion." *Id.* (emphasis added).

Having determined (correctly, *see Kucana*, 130 S.Ct. at 831) that IIRIRA posed no obstacle to its review, the court of appeals then considered whether review was nevertheless precluded by §701(a)(2). *Tamenut*, 521 F.3d at 1003. The court first noted that the "statute governing motions to reopen speaks only to motions filed by a party," and that the relevant regulation, "8 C.F.R. §1003.2(a), provides no guidance as to the BIA's appropriate course of action ... and specifies no standards for a court to use to cabin the BIA's discretion." *Id.* at 1004. The court added that "[t]he use of permissive and discretionary language in the first sentence of §1003.2(a) further supports the inference that the agency action is unreviewable." *Id.* Finally, although the BIA had held that "it may reopen proceedings on its own motion in 'exceptional situations,'" and although "agency decisions about the presence of 'exceptional circumstances,' a similar phrase, are reviewable for abuse of discretion in some contexts, ... there is no statutory, regulatory, or case-law definition of 'exceptional situation' applicable to the

BIA's *sua sponte* power under §1003.2(a)." *Id.* at 1004-05.

Judge Beam dissented. In his view, the body of agency law reopening cases in "exceptional circumstances[,] ... combined with case law pertaining to when exceptional circumstances have been found[,] ought to be sufficient for us to unearth a meaningful standard of review." *Id.* at 1006 (Beam, J., dissenting). Judge Beam cautioned that "[g]iving unfettered authority to administrative agencies to strip our jurisdiction is a slippery slope," and one that need not be tread, in light of the "'strong presumption in favor of judicial review of administrative action.'" *Id.* at 1007 (quoting *INS v. St. Cyr*, 533 U.S. 289, 298 (2001)).

1. BIA's *Sua Sponte* Reopening Decisions Are Reviewable Under *Kucana* and *Heckler*

In *Kucana*, this Court held that the jurisdiction-stripping provision of IIRIRA does not bar judicial review of a BIA decision denying an alien's motion to reopen removal proceedings. 130 S.Ct. at 834. Reasoning from the text, structure, and history of that statute, and mindful of the strong presumption favoring review of agency action, this Court held that §1252(a)(2)(B)(ii) bars review only of decisions made discretionary by the INA itself, and not of decisions made discretionary by regulations promulgated pursuant to the INA. Otherwise, this Court observed, "the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions "discretionary." *Kucana*, 130 S.Ct. at 840.

The BIA's authority to reopen proceedings—*sua sponte* or otherwise—is made discretionary by

regulation. Under *Kucana*, IIRIRA does not bar judicial review of such decisions. *Id.* at 831. The Court in *Kucana* "express[ed] no opinion" on whether the APA might nevertheless bar federal-court review of "the Board's decision not to reopen removal proceedings *sua sponte*." *Id.* at 839 n.18 (citing *Tamenut*). But *Kucana*'s reasoning refutes the position of the Fourth, Sixth, and Eighth Circuits that all such decisions are categorically unreviewable. Indeed, the logic of *Kucana* suggests strongly that appellate courts may generally review such decisions.

The very same statute that provided for appellate jurisdiction over the reopening determinations at issue in *Kucana* provides for appellate jurisdiction over *sua sponte* reopening determinations. *See* 8 U.S.C. §1252 (providing generally for jurisdiction over orders of removal and exceptions thereto). And the very same regulation that placed the decision to reopen "within the discretion of the Board" in *Kucana* applies to *sua sponte* determinations as well. *See* 8 C.F.R. §1003.2(a). Indeed, the regulation does not make *any* distinction between "*sua sponte*" reopening and reopening in response to a timely motion.

Section 1229a(c)(7)(A) states that "[a]n alien may file one motion to reopen proceedings under this section." The Attorney General has interpreted that provision to permit a second motion to reopen based on "changed circumstances arising in the country" of removal. 8 C.F.R. §1003.2(c)(3)(ii). *Kucana* involved such a motion. *See* 130 S.Ct. at 841 n.2 (Alito, J., concurring in the judgment) ("Petitioner challenges the denial of his *second* motion to reopen ....") (citing U.S. Brief) (emphasis added). But the Attorney General surely could revise the regulation to conform to the

statutory minimum of "one motion to reopen" as of right. The consequence would be that a successive motion to reopen—like Mr. Kucana's—would fall under BIA's authority to reopen "on its own motion" "at any time." 8 C.F.R. §1003.2(a). If the Eighth Circuit were correct that all such reopening decisions are categorically unreviewable, the Attorney General could accomplish by regulation precisely the result rejected in *Kucana* (rendering the decision on Kucana's second motion unreviewable).

Whatever else is true, *Kucana* makes clear that the terms of the Attorney General's regulation are not dispositive. *See generally* U.S. *Kucana* Br.; U.S. *Kucana* Reply Br. (Nov. 3, 2009). Yet, the basis of the Eighth Circuit's holding is precisely that §1003.2(a) defines the BIA's discretion over *sua sponte* reopening so broadly that it precludes judicial review under the APA. *See Tamenut*, 521 F.3d at 1003-04.

In holding that the appellate courts retain jurisdiction to review the BIA's equally unfettered discretion to deny motions to reopen by a party, *Kucana* nowhere suggests that review of those decisions might be impeded by the APA because of a dearth of meaningful standards to apply. *Cf. Overton Park*, 401 U.S. at 410. And rightly so: the courts of appeals "routinely review BIA decisions denying motions to reopen without encountering any obstacle created by a lack of meaningful standards of review." *Gor*, 607 F.3d at 197 (Cole, J., concurring). As this Court noted in *Kucana*, "[f]ederal-court review of administrative decisions denying motions to reopen removal proceedings dates back to at least 1916." 130 S.Ct. at 834 (citing *Dada v. Mukasey*, 128 S.Ct. 2307, 2314-15 (2008)). Indeed, "[t]his Court has ultimately

reviewed reopening decisions on numerous occasions." *Id.* (collecting cases).

Congress obviously was well aware of this long tradition of appellate-court review of such decisions. Section §1252(b)(6) of the INA requires a court of appeals to consolidate a petition for review of a denial of reopening with a petition for review of the underlying removal order. 8 U.S.C. §1252(b)(6). As the government pointed out in *Kucana*, "[t]here would have been no need to provide for consolidation if the denial of a motion to reopen were not reviewable at all," U.S. *Kucana* Reply Br.18, whether due to IIRIRA or §701(a)(2)'s bar.

Nothing in this Court's decisions construing §701(a)(2) suggests that there is a distinction between timely and untimely motions to reopen—all of which are governed by the same "discretionary" regulation—that would render the latter categorically immune from judicial scrutiny. There is just as much "law to apply" in the *sua sponte* context as there is on review of a denial of a party's timely motion to reopen. *Overton Park*, 401 U.S. at 410.

Whether timely or untimely, there is no standard for when BIA is "*required* to reopen proceedings on its own motion." *Tamenut*, 521 F.3d at 1005 (emphasis added). The ultimate "decision to grant or deny a motion to reopen is within the discretion of the Board," and the Board may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. §1003.2(a). Nor would review intrude upon the Executive's prerogative to make the ultimate determination, as "'a matter of grace, ... whether aliens can stay in the country or not.'" *Kucana*, 130 S.Ct. at 837 (quoting Tr. of Oral Arg. at 14). As with the

reopening decision held reviewable in *Kucana*, a decision to deny a motion to reopen *sua sponte* is an "adjunct ruling[]" that "ordinarily ... touches and concerns only the question whether the alien's claims have been afforded a fair hearing." *Id.* Accordingly, *sua sponte* reopening determinations are not of a "like kind" with the "'substantive decisions" that Congress expressly committed to executive discretion by statute. *Id.* (*e.g.*, waivers of inadmissibility based on certain criminal offenses, §1182(h), or based on fraud or misrepresentation, §1182(i), and other substantive determinations). Accordingly, the mere fact that the ultimate substantive decision whether to allow an alien to remain in the country may be unreviewable does not counsel against review "to ensure 'that aliens [a]re getting a fair chance to have their claims heard.'" *Id.* at 837 (quoting Tr. of Oral Arg. at 17).

Nor does the Board's refusal to reopen *sua sponte* turn on complex questions of agency resource allocation. *Heckler*, 470 U.S. at 831-32. And unlike the agency decision not to undertake enforcement action held unreviewable in *Heckler*, a BIA decision refusing to reopen *sua sponte* occurs after the culmination of a removal proceeding, which produces an administrative record that "provides a focus for judicial review." *Id.* at 832.

Decisions on a motion to reopen *sua sponte* are cut of the same cloth as various other decisions that the federal courts review with regularity in both administrative and non-administrative arenas. The decision to deny reopening is susceptible to abuse-of-discretion review, *see Kucana*, 130 S.Ct. at 840; whether the motion is timely or not does not transform BIA's decision into one that "involves a complicated

balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler*, 470 U.S. at 831.

2. *Heckler* does not preclude review to the extent that an agency has resolved a question of law

Even if *sua sponte* reopening decisions were not generally reviewable, *Heckler* is no bar to review where an agency decides questions of law. In *Heckler*, this Court applied §701(a)(2) and held that the FDA's refusal to initiate enforcement action was not susceptible to judicial review. That decision was "attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement." *Id.*

Other decisions holding that §701(a)(2) bars review are of a similar ilk. In *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993), for example, the Court held that an agency's allocation of funds in a lump-sum appropriation was unreviewable, because "the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances ... in what it sees as the most effective or desirable way." The Court otherwise has "limited the exception to judicial review provided by 5 U.S.C. §701(a)(2) to cases involving national security, such as *Webster v. Doe*, [486 U.S. 592 (1988),] and *Department of Navy v. Egan*, [484 U.S. 518 (1988),] or those seeking review of refusal to pursue enforcement actions." *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring).

Outside of these distinct, policy-based areas in which the courts "have long been hesitant to intrude," *id.* at 819, this Court has refused to declare the federal

courts incompetent to perform appellate review except in those rare circumstances when it has concluded that there is effectively " 'no law to apply' " to the question, *id.* (quoting *Overton Park*, 401 U.S. at 410). In evaluating whether there is "no law to apply," the Court has focused on whether a given decision can be evaluated under a "judicially administrable standard of review." *Id.* at 820.

"*Sua sponte*" decisions of the character at issue here—denying reopening on the ground that the applicant failed to meet a legal standard established by case law, regulation, or statute, or decisions raising a colorable constitutional question— are different in kind from the sort of agency *in*action that this Court refused to review in *Heckler*. Such decisions are also not akin to questions of prosecutorial discretion, or matters of policy typically outside the traditional review authority of the courts. They instead involve issues in the heartland of judicial competence that affect an individual's liberty and thus "infringe upon areas that courts often are called upon to protect." *Heckler*, 470 U.S. at 832. Several circuits correctly conclude that they are reviewable, and the Eighth Circuit's contrary holding should be reversed.

At a bare minimum, the decision at issue in this case is reviewable. Even assuming that a single obtuse sentence in Ochoa's timely motion to reopen can be read to invoke solely the BIA's *sua sponte* authority, the BIA's decision denying that motion is in all material respects identical to the BIA decision held reviewable in *Kucana*. Unlike the mine run of cases involving BIA *sua sponte* decisions, this case does *not* implicate an agency's discretion to forgive an untimely filing; both the BIA and the court of appeals explicitly

acknowledged that Ochoa's motion was timely. This case does involve, however, BIA's application of legal standards—including the ineffectiveness-of-counsel inquiry—that are well suited to this Court's review. The fact that Ochoa incanted the phrase "*sua sponte*" in her motion does not make the BIA's review any more discretionary, or somehow result in less "law to apply." The Eighth Circuit's categorical refusal to consider the character of the *BIA's decision* it was asked to review thus contravenes this Court's decisions irrespective of whether *sua sponte* denials (or even a subset of such denials) are generally reviewable.

C. The Petition Presents A Recurring Issue Of National Importance

This case involves the power of the federal courts to entertain a challenge to final BIA action where the Board's decision raises legal issues that the courts are well-equipped (and designed) to evaluate. The question presented goes to the proper balance of power between the Judiciary and the Executive. This court has frequently granted certiorari in like cases where lower courts have adjudged themselves incompetent to review entire categories of final agency action. *See, e.g.*, *Kucana v. Holder*, 129 S.Ct. 2075 (2009) (granting certiorari over the government's opposition); *cf. Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 644 (1990) (certiorari granted "because of the significant administrative law questions raised").

Moreover, the context in which this question arises counsels in favor of this Court's review. "'[D]eportation is a drastic measure and at times the equivalent of banishment or exile.'" *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951). This Court has very recently reminded that reopening is an

"'important safeguard'" designed to "'ensure a proper and lawful disposition'" of an alien's case. *Kucana*, 130 S.Ct. at 834 (quoting *Dada*, 128 S.Ct. at 2318). Whether a subset of such motions is categorically disentitled to the equally important safeguard of judicial scrutiny is a question worthy of this Court's plenary review.

The Eighth Circuit's deeply flawed decision reflects a longstanding and broader confusion in the lower courts as to the scope of §701(a)(2)'s narrow exception to judicial review of final agency action. Despite this Court's pronouncements on the subject, the courts of appeals remain hopelessly confused about how to determine whether agency actions are "committed to agency discretion by law" and thus unreviewable. *See, e.g.*, Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 734-40 (1990).

The lower courts' widespread confusion about the scope of §701(a)(2) has also led to conflicting conclusions concerning the reviewability of other types of BIA action—for example, decisions to deny administrative closure or affirm without opinion. *Compare Hernandez v. Holder*, 606 F.3d 900, 904 (8th Cir. 2010) and *Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114, 1118 (9th Cir. 2009) (holding they are not reviewable) *with Cantu-Delgadillo v. Holder*, 584 F.3d 682, 686 (5th Cir. 2009); *Garza-Moreno v. Gonzales*, 489 F.3d 239, 243 (6th Cir. 2007); *Vahora v. Holder*, 626 F.3d 907, 919 (7th Cir. 2010) ("The decision to continue a matter ... simply is not the sort of decision that 'involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise.'") (quoting *Heckler*, 470 U.S. at 831, 832). *Compare*

Haoud v. Ashcroft, 350 F.3d 201, 206 (1st Cir. 2003); *Smriko v. Ashcroft*, 387 F.3d 279, 291 (3d Cir. 2004); and *Chen v. Ashcroft*, 378 F.3d 1081, 1087 (9th Cir. 2004), *with Kambolli v. Gonzales*, 449 F.3d 454, 460-65 (2d Cir. 2006); *Tsegay v. Ashcroft*, 386 F.3d 1347, 1353-56 (10th Cir. 2004); and *Ngure v. Ashcroft*, 367 F.3d 975, 981 (8th Cir. 2004).

The lower courts' confusion about §701(a)(2) is of course not confined to the BIA context, but affects the courts' appellate review of agency action generally. Granting review in this case will afford this Court an opportunity to provide much needed guidance to the lower courts on the proper limits of §701(a)(2)'s narrow exception to judicial review.

II. THE EIGHTH CIRCUIT'S DECISION CONTRAVENES *CHENERY*

The court of appeals acknowledged that the BIA "may have treated Ochoa's motion under the rubric of 8 C.F.R. §1003.2(c)," which governs timely motions by a party, because "BIA noted that Ochoa's motion is 'timely,' a determination pertinent under §1003.2(c)," and "used *Matter of Coelho* ... as its governing legal standard in evaluating Ochoa's evidence." App.6a. But it somehow concluded, nevertheless, that "the Board's treatment of the motion [wa]s unclear." *Id.* Without finally deciding how the BIA treated Ochoa's motion, the court of appeals proceeded to construe the motion for itself, and determined that Ochoa's failure to cite §1003.2(c), coupled with her use of the phrase "*sua sponte*" transformed her concededly timely motion to reopen into a limited request for *sua sponte* reopening. Perhaps most remarkably, the court stated that it would have reached the same result even if it were

clear that "the BIA addressed the merits of Ochoa's claim under a §1003.2(c) analysis." App.8a.

As Judge Colloton's dissenting opinions recognize, the court of appeals' decision blatantly disregards the stated basis of the BIA's decision and construes Ochoa's motion in a manner that defies common sense. The BIA's finding that Ochoa's motion to reopen was "timely" makes sense only if it interpreted her motion as one by a party, as such motions must be filed within 90 days of a final Board decision. The BIA also addressed the merits of Ochoa's motion with reference to regulations and precedent that govern such motions. And, as Judge Colloton observed, there is not a even a "hint" in the BIA's decision that it considered (even in the alternative) whether it should exercise its discretionary authority to reopen *sua sponte* (in stark contrast to the decision at issue in *Tamenut*, on which the court of appeals relied). App.11a; *see Tamenut*, 521 F.3d at 1003-04.

The court of appeals' holding squarely contravenes *Chenery*. Under *Chenery* and its progeny, this Court has long adhered to the "simple but fundamental rule of administrative law" that a court is "*powerless* to ... substitut[e] what it considers to be a more adequate or proper basis" for an agency's explanation of its action. *SEC v. Chenery Corp.* 332 U.S. 194, 196 (1947) ("*Chenery II*") (emphasis added). Because a "judicial judgment cannot be made to do service for an administrative judgment," *Chenery I*, 318 U.S. at 88, agency action must stand or fall "'on the same basis articulated in the order by the agency itself,'" *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962)). Accordingly, the court of appeals was

not free to construe Ochoa's motion afresh as a request for *sua sponte* relief.

Because the Eighth Circuit's decision squarely contravenes this Court's most fundamental holdings concerning the limits of judicial power, it would warrant summary reversal or plenary review even if it were an isolated, aberrant decision. It cannot be so swiftly dismissed, however. Several circuit courts, including the Eighth Circuit, have repeatedly demonstrated a willingness to affirm agency action on grounds not relied upon by the agency, in conflict with *Chenery* and the decisions of other circuits. *See, e.g.*, *Otter Tail Power Co. v. STB*, 484 F.3d 959, 963 (8th Cir. 2007) (holding that a party waived an argument by raising it "fatally late" before the agency, even though the agency had resolved the issue on its merits); *BNSF Ry. Co. v. STB*, 604 F.3d 602, 604 (D.C. Cir. 2010) (affirming STB decision on administrative forfeiture grounds not relied on by the Board, even though the Board had resolved the argument on its merits); *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992) (agency finding that complaint is "timely" does not prevent agency's counsel from asserting timeliness defense in subsequent litigation); *but see Ester v. Principi*, 250 F.3d 1068, 1071-72 (7th Cir. 2001) ("[W]hen an agency decides the merits of a complaint" court may not avoid review on procedural grounds) (citing *Chenery II*); *Abebe v. Gonzales* 432 F.3d 1037, 1041 (9th Cir. 2005) (en banc) (court may not avoid consideration of an issue on administrative forfeiture grounds when the agency "has ignored a procedural defect and elected to consider an issue on its substantive merits"); *Sidabutar v. Gonzales*, 503 F.3d 1116, 1120 (10th Cir. 2007) (same).

Even if the BIA's decision were "unclear," as the

court of appeals found, this Court's decisions command that the proper course would have been to remand to the agency for further explanation. This Court has emphasized "an important corollary of" *Chenery*'s bedrock rule: "If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." *Chenery II*, 332 U.S. at 196. An appellate may not "guess at the theory underlying the agency's action," *id.* at 196-97, because an agency's "action must be measured by what [it] did, not by what it might have done." *Chenery I*, 318 U.S. at 93-94. This Court has on numerous occasions summarily reversed decisions that disregard *Chenery*'s admonition. *See, e.g., INS v. Ventura*, 537 U.S. 12, 16 (2002) (summarily reversing court of appeals for failure "'to remand to the agency for additional investigation or explanation'") (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) and citing *Chenery II*); *Gonzalez v. Thomas*, 547 U.S. 183, 186 (2006) (summarily reversing where court of appeals contravened *Chenery* and *Ventura* by "'conduct[ing] a *de novo* inquiry into the matter being reviewed and ... reach[ing] its own conclusions,'" rather than remanding to the agency); *cf. Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 92-93 (1978) (summarily reversing where court of appeals' holding was based on either a "mistaken" characterization of Board's decision or "exceeded the scope" of its authority to review Board action).

Other circuits have hewed to this fundamental rule of administrative law in indistinguishable circumstances, and the Eighth Circuit's decision thus creates a direct circuit conflict. *See, e.g., Cruz*, 452 F.3d at 250 (remanding to BIA for further explanation where "presented with a 'jurisdictional conundrum' in

that we have no way of knowing whether the BIA declined to exercise its *sua sponte* authority on a reviewable or non-reviewable basis") (citing *Ventura*); *Haoud*, 350 F.3d at 205 (remanding for clarification of the grounds of BIA's decision).

The court of appeals' failure to heed *Chenery*'s command is especially egregious because its own construction of Ochoa's motion is not plausible—one might even say it was "arbitrary or capricious"—and served to deprive her of the federal-court review to which she is entitled under this Court's decisions. Indeed, when asked for a response to Ochoa's petition for rehearing, the government conspicuously declined to defend this aspect of the decision. *See* Reh'g Opp. at 2, 4; App.8a (Colloton, J., dissenting from denial of panel rehearing).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted, and the case should be set for briefing and argument or summarily reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-3715

Ana Rosa Ochoa,	*	
	*	
Petitioner,	*	Petition for Review
	*	of an Order of the
v.	*	Board of
	*	Immigration Appeals.
Eric H. Holder, Jr., Attorney General of the United States,	*	
	*	
Respondent.	*	

Submitted: December 15, 2009
Filed: May 5, 2010

Before BYE, BEAM, and COLLOTON, Circuit Judges.

BEAM, Circuit Judge.

Ana Rosa Ochoa petitions for review of an order of the Board of Immigration Appeals (BIA) entered on November 2, 2007, denying Ochoa's motion to reopen her removal proceedings based upon an alleged ineffective assistance of counsel. Because the BIA's order is precluded from our review, we dismiss the petition.

I. BACKGROUND

Ochoa is a native and citizen of Mexico who entered the United States on or about December 15, 1991. On July 26, 2004, the government initiated removal proceedings against Ochoa by filing a Notice to Appear, charging her with removability. Ochoa conceded removability but filed an application for cancellation of removal.

On January 9, 2006, the Immigration Judge (IJ) orally denied Ochoa's application for cancellation of removal. The BIA affirmed this denial on May 25, 2007. Both the IJ and the BIA determined that Ochoa had good moral character and continuous physical presence in the United States, two elements required for cancellation of removal, but based their denials upon the conclusion that Ochoa failed to show that her removal would result in exceptional and extremely unusual hardship to her qualifying relatives, namely her two United States citizen children.

During the January 9, 2006, hearing before the IJ, Ochoa stated that her son, Guillermo, age seven at the time, suffered from lead poisoning that resulted in learning difficulties. Following this testimony, Ochoa's counsel indicated to the IJ that the issue of Guillermo's poisoning was new to him and requested time to prepare corroborating documents and additional evidence in support of that claim. The IJ asked Ochoa directly why she had not earlier mentioned Guillermo's condition to her attorney and she responded, "I didn't think it was necessary." The IJ declined counsel's request and proceeded to render its oral decision.

Specifically as to the issue of whether Ochoa's removal would create an exceptional and extremely unusual hardship to her two children who are United

States citizens, the IJ held that Ochoa did not meet her burden under the requisite standard. In so holding, the IJ relied in part upon Ochoa's failure to submit any corroborating evidence regarding her assertions about Guillermo's needs and disabilities due to his lead poisoning. Guillermo's condition was not new (her son was diagnosed at the age of two) and there was no evidence regarding economic, political or social conditions in Mexico to augment Ochoa's claim.

The BIA affirmed this ruling, determining that any alleged level of hardship claimed by Ochoa falls short of the exceptional and extremely unusual hardship standard. Ochoa again argued to the BIA that the IJ should have continued her case to permit the submission of evidence concerning the effects of lead exposure on Guillermo, but the BIA reiterated the IJ's conclusion that Ochoa had been given ample time to present such evidence and failed to do so. The BIA especially noted that Ochoa had even failed to present any such evidence before the BIA on appeal. Ochoa did not appeal this May 25, 2007, order of the BIA.

Ochoa did, however, obtain new counsel and sought to reopen her case on July 23, 2007, pursuant to 8 C.F.R. § 1003.2(a) based upon the ineffectiveness of her prior counsel. Ochoa followed the edicts of Matter of Lozada, 19 I&N Dec. 637 (BIA 1988)[1] and included (1)

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[1] We initially held Ochoa's case in abeyance until the BIA ruled on a remand from Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008), which held "there is no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding," and remanded to the BIA to determine whether there is a *non-constitutional* right to effective assistance of counsel and whether the BIA would assert independent administrative authority to grant relief for ineffective assistance of counsel. The BIA issued its ruling in Rafiyev and noted the

evidence of a bar complaint she filed against her prior counsel; (2) an affidavit stating the manner in which her prior counsel handled her case; and (3) evidence of her eligibility for cancellation, including general

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Attorney General's then-recent opinion in Matter of Compean, 24 I&N Dec. 710 (A.G. 2009), which overruled the substantive standards of Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), established a new substantive and procedural framework for reviewing all such claims, and stated that aliens have no constitutional right to effective assistance of counsel. Matter of Compean, 24 I&N Dec. at 713-14. In that light, the BIA in Rafiyev determined that Rafiyev failed to comply with the procedural requirements of Matter of Lozada (the procedural framework in play at the time of Rafiyev's motion) and thus held that reopening based on ineffective assistance of counsel was not warranted. However, the Board reopened Rafiyev *sua sponte* on a separate matter. Accordingly, even though the Board in Rafiyev did not reach the direct question of whether the BIA may assert an independent administrative authority to grant relief for ineffective assistance of counsel, the Attorney General made that finding in Matter of Compean, 24 I&N Dec. at 714 ("In extraordinary cases, where a lawyer's deficient performance likely changed the outcome of an alien's removal proceedings, the Board may reopen those proceedings notwithstanding the absence of a constitutional right to such relief."). Yet the discussion did not end there. The Attorney General revisited the matter yet again, vacated Matter of Compean in its entirety, including the pronouncement that there is no constitutional right to effective assistance of counsel in removal proceedings, and reestablished Matter of Lozada as the standard to apply in these ineffective assistance of counsel claims until further rulemaking is completed. Matter of Compean, 25 I&N Dec. 1 (A.G. 2009). Today, then, we have come full-circle, and apply the very same standard as was in place at the time the BIA issued its November 2, 2007, order in this matter, using Matter of Lozada as our substantive and procedural compass in these claims and recognizing that, at least in the interim, the Board does have the discretion to reopen removal proceedings in the face of claims of ineffective assistance of counsel. Matter of Compean, 25 I&N Dec. at 3.

information about the effects of lead poisoning and documentary evidence of Guillermo's diagnosis and treatment, his resulting learning disabilities and the educational disadvantages of special education students in Mexico.

On November 2, 2007, the BIA denied Ochoa's motion to reopen, reiterating Ochoa's own expressed prior belief that the lead poisoning issue was not necessary to her case and noting that the submitted documents indicated that Guillermo's lead levels had diminished and at one point were in the normal range. Specifically discussing the "new evidence" submitted by Ochoa, the Board held that even though it was "troubled by evidence indicating that the child suffers from educational problems stemming from her 9-year-old child's lead poisoning at the age of two, the respondent has failed to demonstrate this evidence was unavailable or could not have been discovered or presented at her former hearing."

Ochoa petitions for review of the BIA's November 2, 2007, order.[2]

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[2] Although Ochoa's petition is expressly limited to a request to review the BIA's November 2, 2007, order, she additionally seeks review of the BIA's May 25, 2007, order affirming the IJ's January 9, 2006, denial of her application for cancellation of removal. We lack jurisdiction to review the BIA's May 25, 2007, order. "We lack jurisdiction to review [a denial of a cancellation of removal for a failure to prove an exceptional and extremely unusual hardship to an American-citizen child] because it 'is precisely the discretionary determination that Congress shielded from our review.'" Zacarias-Velasquez v. Mukasey, 509 F.3d 429, 434 (8th Cir. 2007) (quoting Meraz-Reyes v. Gonzales, 436 F.3d 842, 843 (8th Cir. 2006) (per curiam)); see 8 U.S.C. § 1252(a)(2)(B)(i) ("Notwithstanding any other provision of law . . .

II. DISCUSSION

Before reaching the merits of this case, we find ourselves halted by precedent. Noted above, Ochoa filed her motion to reopen with the BIA "pursuant to 8 C.F.R. 1003.2(a)" and requested that the BIA reopen "on their own motion." The Board, however, may have treated Ochoa's motion under the rubric of 8 C.F.R. § 1003.2(c), which contemplates motions to reopen on the basis of new, material and previously unavailable evidence. This is possible because first the BIA noted that Ochoa's motion is "timely," a determination pertinent under § 1003.2(c). And, the BIA used Matter of Coelho, 20 I&N Dec. 464 (BIA 1992), as its governing legal standard in evaluating Ochoa's evidence. Matter of Coelho is a case that, in part, discusses the heavy burden laid upon a movant when proffering new evidence in a motion to reopen and did not involve the exercise of the Board's *sua sponte* authority. Id. at 473. While the Board's treatment of the motion is unclear, and the stated basis for Ochoa's motion is a seemingly technical difference on the surface, the basis is indeed most critical, for it stops us in our tracks today.

In Tamenut v. Mukasey, 521 F.3d 1000, 1005 (8th Cir. 2008) (en banc),[3] we held that "the BIA's decision whether to reopen proceedings on its own motion under 8 C.F.R. § 1003.2(a) is committed to agency discretion by law" and is thus unreviewable by an

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no court shall have jurisdiction to review any judgment regarding the granting of relief under section . . . 1229(b) . . . .").

[3] This opinion was left intact by Kucana v. Holder, 130 S. Ct. 827 (2010), which "express[ed] no opinion on whether federal courts may review the Board's decision not to reopen removal proceedings *sua sponte*." Id. at 839 n.18.

appellate court. In Tamenut, after making this determination we concluded that we "lack[ed] jurisdiction" over Tamenut's challenge to the BIA and we dismissed the petition accordingly. 521 F.3d at 1005. More precisely, the dismissal in *Tamenut*, while the proper disposition, was due to our inability to review an agency action "committed to agency discretion by law" under § 701(a)(2) of the Administrative Procedure Act (APA), not because we lacked jurisdiction. Id. at 1003.

The APA is not an independent jurisdictional provision. Califano v. Sanders, 430 U.S. 99, 105-06 (1977). The APA is a procedural statute that provides no substantive requirements but merely provides the framework for judicial review of agency action. Preferred Risk Mut. Ins. Co. v. United States, 86 F.3d 789, 792 (8th Cir. 1996). The Supreme Court's recent proscription against "drive-by jurisdictional rulings" compels us to make this distinction in the interest of facilitating the clarity sought by the Court. Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1244 (2010) (quotation omitted); see also Oryszak v. Sullivan, 576 F.3d 522, 524-25 (D.C. Cir. 2009) (explaining that a federal court has jurisdiction under 28 U.S.C. § 1331 to hear a claim under the APA, but because the APA does not apply to agency action committed to agency discretion by law, a plaintiff who challenges such an action cannot state a claim under the APA and the court will properly grant a motion to dismiss the complaint for failure to state a claim). When a plaintiff complains about an action that is committed to agency discretion by law, it does not mean that a court lacks subject matter jurisdiction over the claim. Instead, it means that there is no law to apply because the court

has no meaningful standard against which to judge the agency's unfettered exercise of discretion. Heckler v. Chaney, 470 U.S. 821, 830 (1985); Oryszak, 576 F.3d at 526.

Under these circumstances, we see no way around Tamenut's proscription given Ochoa's express reliance on § 1003.2(a) throughout her filings and argument. Even if the BIA addressed the merits of Ochoa's claim under a § 1003.2(c) analysis, it does not circumvent the posture of the motion and the petition now before us.[4]

Accordingly, we are unable to review the BIA's determination on appeal and we dismiss the petition for review.

COLLOTON, Circuit Judge, concurring in part and dissenting in part.

The parties agree that this court should review the decision of the Board of Immigration Appeals ("BIA") denying Ana Rosa Ochoa's motion to reopen her removal proceedings. I disagree with the court's contrary conclusion, and I further conclude that the BIA abused its discretion in denying the motion.

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[4] One could possibly argue that by treating Ochoa's motion as one filed under § 1003.2(c), if indeed it did, the Board necessarily provided us a plausible meaningful standard we would normally find lacking in the *sua sponte* context. Yet, even were we to circumvent the wall we find firmly erected by Tamenut and review the BIA's November 2, 2007, order, we would dismiss nonetheless. The BIA acted within its discretion in determining that Ochoa failed to meet her "heavy burden" and in denying her motion to reopen. Matter of Coelho, 20 I&N Dec. at 473; Matter of Lozada, 19 I&N Dec. at 638-39.

Therefore, I would remand the case for further proceedings.[5]

An alien may file one motion to reopen removal proceedings as of right, as long as the motion is filed within ninety days after the date on which the final administrative decision is rendered. 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2). We review the BIA's decision on such a motion under a deferential abuse-of-discretion standard. *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010). The governing regulations also provide that the BIA "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." 8 C.F.R. § 1003.2(a). The decision whether to exercise this *sua sponte* reopening authority is committed to agency discretion by law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008) (en banc) (per curiam).

After the BIA affirmed the decision of an immigration judge denying Ochoa's request for cancellation of removal, Ochoa filed a motion to reopen alleging ineffective assistance of former counsel. She filed the motion within ninety days of the BIA's final administrative decision, in accordance with 8 U.S.C. § 1229a(c)(7)(C)(i) and 8 C.F.R. § 1003.2(c)(2). The BIA denied the motion, and Ochoa filed a timely petition for review. *See* 8 U.S.C. § 1252(b)(1). This court thus has jurisdiction to review the BIA's denial of Ochoa's motion to reopen. *See* 8 U.S.C. § 1252(a)(1); *Tamenut*, 521 F.3d at 1003.

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[5] I agree with the court that we lack jurisdiction to review the BIA's separate order of May 25, 2007. *Ante*, at 5 n.2.

The court reasons that the decision is unreviewable because Ochoa's pleading before the BIA stated that she moved to reopen "pursuant to 8 C.F.R. [§] 1003.2(a)," and "requested that the BIA reopen 'on their own motion.'" *Ante*, at 5. The court evidently concludes that the agency's only action in response to Ochoa's motion was a refusal to reopen the case on its own motion, and that this decision is committed to agency discretion under Tamenut. There are several difficulties with this conclusion.

Ochoa's reference to 8 C.F.R. § 1003.2(a) does not by itself imply a request for the BIA to exercise its authority to reopen *sua sponte*. As the heading of § 1003.2(a) indicates, the subsection sets forth "[g]eneral" provisions about the filing of motions to reopen, including motions as of right by a party under 8 U.S.C. § 1229a(c)(7) and 8 C.F.R. § 1003.2(c). The regulation does not speak only to action on the BIA's own motion. For example, § 1003.2(a) provides that "[a] request to reopen or reconsider any case in which a decision has been made by the Board, *which request is made by the Service, or by the party affected by the decision*, must be in the form of a written motion to the Board." 8 C.F.R. § 1003.2(a) (emphasis added).

It is also not clear from the text of Ochoa's motion that she sought reopening on the BIA's own motion. The sentence in the motion to which the court refers is grammatically incoherent: "Respondent requests that the Board of Immigration Appeals (BIA) this case on their own motion to Reopen." The plural pronoun "their" does not parallel either Ochoa or the BIA, both of which are singular. But even assuming that Ochoa did ask the BIA to reopen on its own motion, her motion did not state that she relied *exclusively* on this

purely discretionary form of relief. An alien may follow a belt-and-suspenders approach, asking the BIA to reopen on the alien's timely motion and on the BIA's own motion.

Most important, we review the BIA's decision, not Ochoa's motion. The BIA was free to construe Ochoa's filing as a motion by a party under 8 U.S.C. § 1229a(c)(7), and it is clear that the agency did so. The BIA concluded that Ochoa had "filed a *timely* motion to reopen," A.R. 2 (emphasis added), a conclusion that is relevant only to a motion by a party, as there is no time limit on the BIA's authority to reopen on its own motion. The BIA then analyzed Ochoa's motion according to the legal standard established in *Matter of Coelho*, 20 I. & N. Dec. 464 (BIA 1992). *Coelho* applied the standards of *INS v. Doherty*, 502 U.S. 314 (1992), a decision that concerned a motion to reopen by a party and established that a denial of such a motion is subject to judicial review for abuse of discretion. *Id.* at 323. There is not even a hint in the BIA's decision on Ochoa's motion that it considered whether to exercise its "limited discretionary powers" to reopen cases on its own motion. *See In re J-J-*, 21 I. & N. Dec. 976, 984 (BIA 1997).

The Attorney General recognizes that the agency's decision on the motion to reopen is judicially reviewable. The respondent's brief concedes that we should review the BIA's decision denying Ochoa's motion for abuse of discretion. I agree with this submission, and conclude that this court should review the BIA's denial.

As noted, we review the BIA's denial of a motion to reopen for abuse of discretion. Motions to reopen are disfavored, because they undermine the government's

legitimate interest in finality, and the Attorney General's discretion in ruling on the motions is broad. *Doherty*, 502 U.S. at 323; *Alemu v. Mukasey*, 509 F.3d 907, 909 (8th Cir. 2007). Nonetheless, we will reverse if the BIA fails to give a rational and reasoned explanation for its decision. *Alemu*, 509 F.3d at 909; *Perwolf v. INS*, 783 F.2d 112, 113 (8th Cir. 1985). The BIA's cursory decision on Ochoa's motion cannot withstand even this deferential review.

Ochoa's motion urged the BIA to reopen her removal proceedings, under the rule established by *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), because her former counsel was ineffective in pursuing her application for cancellation of removal. Specifically, Ochoa observed that a successful application for cancellation must demonstrate that removal would "result in exceptional and extremely unusual hardship" to a spouse, parent, or child who is a citizen of the United States or lawful permanent resident. 8 U.S.C. § 1229b(b)(1)(D). Her motion argued that she could have made this showing with respect to her nine-year-old son, who is a United States citizen. But she complained that former counsel failed to obtain evidence about the hardship that removal would cause, and failed to include such evidence in Ochoa's administrative submissions. The motion to reopen recounted that Ochoa's son suffered lead poisoning from birth through the age of three, that he is a special education student who is functioning below his grade level, and that Mexico "does not give every child with educational disabilities the services required," while such services are "mandatory" in the United States.

The BIA, while acknowledging that Ochoa satisfied the procedural requirements of *Lozada*, answered her

argument in two sentences. First, the BIA cited Ochoa's admission that she did not previously think the lead poisoning issue was necessary to her case, and that she did not say anything to her attorney about it during the removal proceedings. This conclusion, however, is not responsive to Ochoa's argument that counsel had a professional obligation to *inquire* about matters that would assist in making a case for cancellation of removal, and that counsel should have *elicited* the information about lead poisoning from Ochoa. The BIA may or may not believe that counsel had such an obligation, but we do not know, because the BIA never addressed the point.

Second, the BIA observed that the son's lead levels had diminished, and that his levels were in the normal range at the time of the last reading in 2002. But Ochoa's contention is not that her son currently suffers from excessive lead levels. Her claim is that he suffered lead poisoning in his early years, and that this poisoning resulted in educational disabilities that are still present. The BIA never addressed whether it believed that differences between special education services available in Mexico and in the United States would amount to "exceptional and extremely unusual hardship" for Ochoa's son if his mother were removed to Mexico. Thus, we have no decision from the BIA on whether the alleged ineffective assistance of counsel caused actual prejudice in the removal proceedings.

Because the BIA failed to render a reasoned decision on Ochoa's motion to reopen, I would remand the case for further proceedings with respect to Ochoa's claim of ineffective assistance of counsel. As there is no constitutional right to effective counsel in removal proceedings, a finding by the BIA that Ochoa

established a claim under the standards set forth in *Matter of Lozada* would require the BIA also to address whether it recognizes a purely administrative right to effective counsel in removal proceedings. *See Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-3715

Ana Rosa Ochoa

Petitioner

v.

Eric H. Holder, Jr., United States Attorney General

Respondent

Appeal from Board of Immigration Appeals
(A79-587-385)

JUDGMENT

The cause was submitted on petition for review of an order from the Board of Immigration Appeals, on the original record and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the petition for review is dismissed in accordance with the opinion of this court.

May 05, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-3715

Ana Rosa Ochoa

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v.

Eric H. Holder, Jr., United States Attorney General

Respondent

Appeal from Board of Immigration Appeals
(A79-587-385)

ORDER

The petition for rehearing by the panel filed by petitioner is denied.

COLLOTON, Circuit Judge, dissenting from denial of rehearing by the panel.

The panel majority concluded that the BIA's only action on Ana Ochoa's motion to reopen was a refusal to exercise its discretionary authority to reopen the case *sua sponte*. *Ochoa v. Holder*, 604 F.3d 546, 550 (8th Cir. 2010). Therefore, the panel concluded that the BIA's decision was committed to agency discretion by law, and dismissed the petition for review. *Id.*; *see Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008) (en banc).

The lead argument in Ochoa's petition for rehearing is that the panel erred by mischaracterizing the BIA's action on Ochoa's motion to reopen as a refusal to act *sua sponte*, rather than as a denial of a timely motion to reopen filed by a party. The government utterly fails to address this argument. Its response to the petition for rehearing states only that "*[t]o the extent that the panel determined* that Ochoa filed a motion to reopen requesting that the Board reopen *sua sponte*, the panel accurately applied this Court's well-settled precedent" of *Tamenut*. This statement of the obvious is not responsive to Ochoa's contention. The question is whether the panel *correctly* determined that the BIA's only action was a refusal to reopen *sua sponte*. Because the government acknowledged in its brief on appeal that the BIA's decision is reviewable for abuse of discretion, and then declined in its response to the petition for rehearing to defend the key premise of the panel's decision, I would grant the petition for rehearing by the panel. *See* 604 F.3d at 550-52 (dissenting opinion).

August 27, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-3715

Ana Rosa Ochoa

Petitioner

v.

Eric H. Holder, Jr., United States Attorney General

Respondent

Appeal from Board of Immigration Appeals
(A79-587-385)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Melloy took no part in the consideration or decision of this matter.

September 17, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-3715

Ana Rosa Ochoa

Petitioner

v.

Eric H. Holder, Jr., United States Attorney General

Respondent

Appeal from Board of Immigration Appeals
(A79-587-385)

CORRECTED ORDER

The petition for rehearing en banc filed by petitioner Ms. Ana Rosa Ochoa is denied. Judge Melloy took no part in the consideration or decision of this matter.

September 20, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

8 C.F.R. § 1003.2

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Subpart A—Board of Immigration Appeals

* * *

§ 1003.2 Reopening or reconsideration before the Board of Immigration Appeals.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.

* * *

(c) *Motion to reopen.* (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not

have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

* * *

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[DATE STAMP OMITTED]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF	)	
Ana Rosa OCHOA	)	
A 79 587 385	)	RESPONDENT'S
	)	MOTION TO
	)	REOPEN AND
RESPONDENT	)	STAY OF
	)	DEPORTATION
	)	
	)	

COMES NOW the Respondent, Ana Rosa Ochoa, pursuant to 8 C.F.R. 1003.2(a) and respectfully moves this court to reopen her case. Respondent requests that the Board of Immigration Appeals (BIA) this case on their own motion to Reopen. In support of her motion, Respondent states:

1. That Respondent is a native and citizen of Mexico. She entered the United States on December 15, 1991 without Inspection. The Respondent was placed into Removal

Proceedings by Immigration filing a Notice to Appear (NTA) on July 26, 2004. The Respondent, through Counsel, requested leave to file an application for Cancellation of Removal. The Respondent, through previous Counsel, filed the required application by the date set by the Court of January 9, 2006. (Exhibits A & B)

2. That the Immigration Judge ordered Respondent removed from the United States on June 6, 2007. This order was appealed to the Board of Immigration Appeals and subsequently denied. (Exhibit C)
3. That Respondent would like to reopen her removal proceedings based on ineffective assistance of counsel.
4. That Respondent has satisfied the requirements set by the Board of Immigration Appeals for filing a motion to reopen based on an ineffective assistance of counsel claim pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). (Exhibit D)

5.) That Respondent has filed a bar complaint against her previous Attorney, Ta-Yu Yang, with the Iowa Supreme Court, Attorney Disciplinary Board. (Exhibit E)

6.) That Respondent's previous Attorney, Mr. Ta-Yu Yang, has not yet responded to the bar complaint against him for the ineffective assistance of counsel with the Respondent.

7.) That Respondent's previous Attorney, Mr. Ta-Yu Yang has not returned a phone call to our office regarding the Respondent's matter.

8.) That Respondent has also enclosed a signed affidavit which states the matter in which Mr. Yang has handled her case. (Exhibit F)

Eligibility for Cancellation of Removal

9) The Respondent has two USC children, Viridiana age 13, and Guillermo age 9. The Respondent also has another son, Cesar, age 16 who is illegal since he was brought to the United States at a young age. (Exhibits G through H)

10) According to the INA Section 240(A)(b), the respondent must establish that: (1) she has been physically present in the United States for a continuous period of at least 10 years immediately proceeding the service of the NT A; (2) she has been a person of good moral character throughout such period and up to the date of such application; (3) she has not been convicted of any offense under INA 212(a)(2), 237(a)(2) or 237(a)(3) and (4) her removal would result in exceptional and extremely unusual hardship to her United States Citizen or lawful permanent resident, spouse, parent, or child.

11) The Respondent has been in the United States since December of 1991, therefore she has been in the United States for over 15 years.

12) The Respondent is a person of good moral character, she has maintained an upstanding relationship and image in the community and has always filed her income taxes.

13) The Respondent has never been arrested or convicted of any crimes in the United States.

14) The Respondent can establish exceptional and extremely unusual hardship to her United States citizen son, Guillermo, who is 9 years old.

15) That Respondent sought the assistance of Mr. Terry Houlton, an Education Professional, to assess the level of hardship to the Respondent's USC child, Guillermo. (Exhibit I)

16) According to Mr. Houlton's findings during his assessment, Guillermo was diagnosed of having lead poisoning in the years before he entered preschool (age's birth through three years). (Exhibit J) Mr. Houlton's findings are as follows:

   a. Guillermo since the first grade has indicated some learning disabilities.

   b. Since the end of the third grade, Guillermo, has not be functioning on this grade level in reading, math, and writing. (Exhibit K)

   c. Guillermo is currently functioning more than one year below grade level in reading, math, and writing. He is functioning a little closer to a first-grade level.

   d. Guillermo has been classified as a 'Special Education Student'.

   e. The Developmental and Health History, taken my the school nurse, Rene Mathews, RN, BSN, states that Guillermo has a positive history of lead poisoning.

   f. Guillermo has had his highest level of lead poisoning of 18. According to World Health Organization and Mr. Houlton's findings, Reports suggest that a blood level of 10 micrograms per deciliter can have harmful effects on children's learning and behavior. (Exhibit L)

g. Mr. Houlton also states the educational disadvantages of 'Special Education Students' in the United States compared to Mexico. Mexico still does not give every child with educational disabilities the services required, as in the United States it is mandatory.

17) Lead poisoning according to World Health Organization on water-related diseases, states that "lead interferes with the metabolism of calcium and vitamin, blood leads levels in children can cause consequences which may be irreversible including learning disabilities, behavioral problems, and mental retardation. At very high levels, lead can cause convulsions, coma, and death." (Exhibit L)

18) The Respondent has also received numerous doctors' visits to check his levels and treatment of the symptoms. (Exhibit M)

19) That it is clear that Respondent has been prejudiced by former counsel's failure to include and/or obtain this evidence in support of her claim for Cancellation of Removal.

20) That the record clearly indicates that this evidence should have been included in the original submission (Exhibit N) for the court to make an informed and educated decision regarding the hardship issue.

WHEREFORE Respondent requests that her case be reopened pursuant to *Matter of Lozada*, and *Motion for Stay of Deportation* granted during the pendency of this motion.

Respectfully submitted this 23rd day of July, 2007.

[DATE STAMP OMITTED]

Ana Rosa OCHOA, Respondent

by: s/Bart A. Chavez
Bart A. Chavez, NE #19920
Chávez & Associates, P.C., LLO
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Omaha, Nebraska 68144
Attorney for Respondent

U.S. Department of Justice — Decision of the Board of Immigration Appeals

Executive Office For Immigration Review

Falls Church, Virginia 22041

File: A79 587 385 - Omaha, NE — Date: Nov. 02 2007

In re: ANA ROSA OCHOA
IN REMOVAL PROCEEDINGS
MOTION
ON BEHALF OF RESPONDENT: Bart A. Chavez, Esquire
ON BEHALF OF DHS: Daniel A. Morris
Assistant Chief Counsel

CHARGE:
Notice: Sec. 212(a(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without admitted or paroled

APPLICATION: Cancellation of removal

ORDER:

PER CURIAM. In a decision dated May 25, 2007, this Board affirmed an Immigration Judge's decision denying the respondent's application for relief and reinstated her 60-day voluntary departure period. The respondent has now filed a timely motion to reopen with this Board based upon ineffective assistance of counsel and her son's medical condition. The Department of Homeland Security has opposed reopening of the proceedings.

In order to state a valid ineffective assistance of counsel claim, an alien must establish prejudice. *See Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) *aff'd*, 857 F .2d 10 (1st Cir. 1988). The term "prejudice," refers to actual prejudice. *See Matter of Assaad, supra.* The respondent argues that the information regarding her son's lead poisoning should have been included in the original submission by her attorney and that he failed to adequately present the facts of her case. However, the respondent admitted that she did not think the lead poisoning issue was necessary to her case and therefore, she did not say anything to her attorney about it (Tr. at 40). Moreover, the documents submitted by the respondent indicate that his lead levels have diminished and at the last lead level reading in 2002, his levels were in the normal range (Exh. J at 2). Although the respondent has presented evidence that she complied with the requirements set forth in *Matter of Lozada supra*, she has not demonstrated ineffective assistance of counsel. *See Matter of Assaad supra.*

"A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or [sic] motion to reopen were granted the new evidence presented would likely change the result in the case. *Matter of Coelho, supra.* The respondent attempts to offer "new evidence" to support her request for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). While we are troubled by evidence indicating that the child suffers from educational problems stemming from her 9-year-

old child's lead poisoning at the age of two, the respondent has failed to demonstrate this evidence was unavailable or could not have been discovered or presented at her former hearing. Accordingly, the respondent's motion fails to present new or previously unavailable evidence that would warrant reopening her case. *See Matter of Coelho, supra.* The respondent's motion to reopen is denied.

s/Roger Pauley
FOR THE BOARD

OPPOSITION BRIEF

185 (3)

APR 11 2011

No. 10-920

In the Supreme Court of the United States

ANA ROSA OCHOA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's challenge to the Board of Immigration Appeals' denial of her motion to reopen immigration proceedings.

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In the Supreme Court of the United States

No. 10-920

ANA ROSA OCHOA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 604 F.3d 546. The opinion of the Board of Immigration Appeals (Pet. App. 28a-30a) denying petitioner's motion to reopen is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a) was entered on May 5, 2010. A petition for rehearing was denied on September 20, 2010 (Pet. App. 18a-19a). On December 6, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 18, 2011, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b (2006 & Supp. III 2009). The discretion of the Attorney General to grant relief from removal is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yuch-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted). To obtain cancellation of removal, the alien must demonstrate both that she is statutorily eligible for such relief and that she warrants a favorable exercise of discretion. See, *e.g.*, *Guled* v. *Mukasey*, 515 F.3d 872, 879-880 (8th Cir. 2008). The alien bears the burden of proving eligibility for cancellation of removal. 8 U.S.C. 1229a(c)(4)(A)(i); 8 C.F.R. 1240.8(d).

To demonstrate statutory eligibility for cancellation of removal, an alien who is not a lawful permanent resident must show that she has been physically present in the United States for a continuous period of at least ten years; that she has been a person of good moral character during that period; that she has not been convicted of certain listed crimes; and (as particularly relevant here) "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1). To demonstrate "exceptional and extremely unusual hardship," the alien must show that the hardship to a qualifying relative is "substantially beyond the ordinary hardship that would be expected when a close family member leaves this country." *In re Monreal-*

Aguinaga, 23 I. & N. Dec. 56, 62 (B.I.A. 2001) (internal quotation marks omitted).

In addition to satisfying the statutory eligibility requirements, an applicant for cancellation of removal must establish that she warrants such relief as a matter of discretion. *In re C-V-T-*, 22 I. & N. Dec. 7 (B.I.A. 1998). Whether an applicant warrants discretionary cancellation of removal is a case-specific determination made by "balanc[ing] the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his [or her] behalf to determine whether the granting of . . . relief appears in the best interest of this country." *Id.* at 11 (quoting *In re Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978)).

b. An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c) (Board), 1003.23(b) (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3). When the motion to reopen is filed with the Board, it "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1); see 8 C.F.R. 1003.23(b)(3) (IJ). An alien is entitled to file only one such motion to reopen, and it generally must be filed within 90 days of entry of the

final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The IJs and the Board have discretion in adjudicating a motion to reopen, and they may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a) (Board); see 8 C.F.R. 1003.23(b)(3) (IJs); see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

The IJ or the Board may reopen an alien's case *sua sponte* at any time. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), 1003.23(b)(1) (similar for IJ). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

2. Petitioner is a native and citizen of Mexico. Pet. App. 2a. She entered the United States illegally in December 1991. *Ibid.*; Administrative Record (A.R.) 285. She has two United States citizen children and one child who was born in Mexico. A.R. 244.

In 2004, U.S. Immigration and Customs Enforcement (ICE) charged petitioner with being removable as an alien present in the United States without having been admitted or paroled. A.R. 414-415; see 8 U.S.C.

1182(a)(6)(A)(i). Petitioner conceded removability but sought cancellation of removal under 8 U.S.C. 1229b(b)(1) and voluntary departure under 8 U.S.C. 1229c. See Pet. App. 2a; A.R. 256, 269, 322-328.

After a hearing, the IJ determined that petitioner was removable as charged, denied her application for discretionary cancellation of removal, and granted her application for voluntary departure. A.R. 243-250. The IJ determined that petitioner is ineligible for cancellation of removal because she failed to show that her removal would result in "exceptional and extremely unusual hardship" to her two United States citizen children, a prerequisite under 8 U.S.C. 1229b(b)(1)(D). A.R. 246-247.

The IJ explained that "cancellation of removal is an extraordinary form of relief not intended by Congress for most alien[s] who find themselves in removal proceedings," and that the "exceptional and extremely unusual hardship" standard requires the applicant to demonstrate that her qualifying relative "would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the alien's deportation." A.R. 246-247 (citing, *inter alia*, *In re Monreal-Aguinaga*, *supra*). In this case, the IJ continued, although petitioner "asserted that her son, Guillermo, was found to have high levels of lead" at age two and that "he receives counseling at his school for learning disabilities," she "has not submitted any evidence to either corroborate these assertions or to develop them as exceptional and extremely unusual hardship factors." A.R. 248. The IJ noted that "[t]he record does not establish that these conditions are new or that corroborative evidence could not have been previously obtained." *Ibid.* (footnote omitted). Finally, the IJ observed that peti-

tioner did not present "any evidence regarding economic, political or social conditions in Mexico" to support her hardship claim, or evidence to show that the emotional or psychological impact of petitioner's departure on her qualifying relatives would constitute exceptional and extremely unusual hardship. A.R. 248-249. Considering the hardship factors "cumulatively," the IJ concluded that the hardship caused by petitioner's removal would not exceed the normal economic and social disruptions involved when any alien is removed. A.R. 249.

The IJ then granted petitioner's application for voluntary departure, informing petitioner that she would be required to depart the United States by March 10, 2006, and if she did not, she "would not be eligible for certain forms of relief under the Immigration Law"—including "cancellation of removal"—"for 10 years." A.R. 249-250, 312.

3. The Board dismissed petitioner's appeal. A.R. 198-199. The Board "agree[d]" with the IJ that petitioner was ineligible for cancellation of removal "because she failed to show that her removal would result in exceptional and extremely unusual hardship to her qualifying relatives, namely her two United States citizen children." A.R. 198. The Board determined that petitioner's evidence of hardship "falls short of the exceptional and extremely unusual standard set forth * * * in the [INA]." *Ibid.* The Board also rejected petitioner's argument that the IJ should have continued the case so she could submit additional evidence of hardship, explaining that the IJ "correctly determined that [petitioner] had been given ample time to present evidence of any health conditions." *Ibid.* Indeed, the Board noted that "even now on appeal, [petitioner] has provided

no evidence in support of her contention" that her son would suffer hardship because of health conditions. *Ibid.*

The Board then observed that petitioner had been granted voluntary departure, and informed her that she was required to voluntarily depart the United States within 60 days of the Board's order, and that if she failed to so depart, she would "be ineligible for a period of 10 years for any further relief under" the INA, including cancellation of removal. A.R. 198-199. To the best of the government's knowledge, petitioner has not voluntarily departed the United States.

4. Petitioner did not seek judicial review of her final removal order. Instead, she filed a motion to reopen proceedings with the Board, contending that her previous attorney had rendered ineffective assistance by failing to obtain and present evidence corroborating her claims about her son's lead poisoning. Pet. App. 22a-27a. Although petitioner filed her motion to reopen within 90 days of the Board's order, her motion did not cite the standards for motions to reopen based on new, material, and previously unavailable evidence, 8 U.S.C. 1229a(c)(7)(B), 8 C.F.R. 1003.2(c)(1); instead, it requested that the Board reopen her case "on their own motion to Reopen" under 8 C.F.R. 1003.2(a). Pet. App. 22a.

The Board denied the motion. Pet. App. 28a-30a. In response to petitioner's argument that "information regarding her son's lead poisoning should have been included in the original submission by her attorney," the Board noted that petitioner herself "admitted that she did not think the lead poisoning was necessary to her case and therefore, she did not say anything to her attorney about it." *Id.* at 29a. Further, the Board ex-

plained, the documents petitioner submitted with her motion to reopen "indicate that [her son's] lead levels have diminished and at the last lead level reading in 2002, his levels were in the normal range." *Ibid.* Accordingly, the Board determined that petitioner failed to show that her prior attorney was ineffective. *Ibid.*

In addition, the Board noted that the documents petitioner sought to present in support of her application for cancellation of removal did not constitute new evidence that was "unavailable or could not have been discovered or presented at her former hearing," Pet. App. 30a, and that petitioner therefore failed to meet the prerequisites for reopening under *In re Coelho*, 20 I. & N. Dec. 464 (B.I.A. 1992). Pet. App. 29a-30a.

5. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-14a. The court noted that, on its face, it was not clear whether petitioner's motion to reopen was seeking reopening on the basis of "new, material and previously unavailable evidence" under 8 C.F.R. 1003.2(c), or *sua sponte* reopening, *i.e.*, reopening on the Board's own motion under 8 C.F.R. 1003.2(a). Pet. App. 6a. The court noted that the Board appeared to treat the motion as a timely motion seeking reopening based on new evidence, although it ultimately found the Board's treatment to be "unclear." *Ibid.* Reviewing petitioner's filing itself, the court determined that it sought *sua sponte* reopening, not reopening based on new evidence, because it cited 8 C.F.R. 1003.2(a), which addresses *sua sponte* reopening, and specifically "requested that the [Board] reopen 'on their own motion.'" Pet. App. 6a; see *id.* at 8a.

Because petitioner sought *sua sponte* reopening, the court determined that it lacked jurisdiction to review the Board's decision. Pet. App. 6a-8a. Relying on its prior

decision in *Tamenut* v. *Mukasey*, 521 F.3d 1000 (8th Cir. 2008) (per curiam) (en banc), the court held that the Board's decision whether to exercise its discretionary authority to reopen proceedings *sua sponte* under 8 C.F.R. 1003.2(a) "is committed to agency discretion by law" under the Administrative Procedure Act, 5 U.S.C. 701(a)(2). Pet. App. 6a-7a (quoting *Tamenut*, 521 F.3d at 1005). The court explained that "there is no law to apply" because the court has no meaningful standard against which to judge the agency's exercise of discretion, and *sua sponte* reopening is therefore unreviewable by the courts of appeals. *Id.* at 7a-8a (citing *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)).

In the alternative, the court of appeals held that even if it could review the Board's denial of petitioner's motion to reopen, it would "dismiss nonetheless" because the Board "acted within its discretion" in finding that petitioner "failed to meet her heavy burden and in denying her motion to reopen." Pet. App. 8a n.4 (internal quotation marks omitted).

Judge Colloton concurred in part and dissented in part, stating that he would treat petitioner's motion as a timely motion seeking reopening based on new evidence, rather than a motion seeking *sua sponte* reopening, and that he would hold that the Board abused its discretion in denying the motion. Pet. App. 8a-14a.

6. Petitioner sought panel rehearing and rehearing en banc, which the court of appeals denied. Pet. App. 16a-17a, 19a.

ARGUMENT

Petitioner contends (Pet. 15-34) that the court of appeals erred in dismissing her challenge to the Board's denial of her motion to reopen. The court of appeals'

decision is correct, and it does not conflict with any decision of this Court or of another court of appeals. In any event, this case would present a poor vehicle to consider the questions presented, because petitioner's failure to depart the United States voluntarily means that she likely cannot obtain the relief she ultimately seeks—discretionary cancellation of removal. Further review is therefore unwarranted.

1. The court of appeals correctly rejected petitioner's challenge to the Board's denial of her motion to reopen. The court held that it could not review a Board determination not to reopen a case *sua sponte*, Pet. App. 6a-8a, and that even if it could review the denial of petitioner's motion, the Board's decision was not an abuse of discretion because petitioner failed to justify reopening, *id.* at 8a n.4. The court was understandably uncertain about how to characterize petitioner's motion to reopen. Although the motion was timely filed, petitioner specifically requested (*id.* at 22a) that the Board reopen her case "on their own motion" under 8 C.F.R. 1003.2(a), which provides that "[t]he Board may at any time reopen or reconsider *on its own motion* any case in which it has rendered a decision." Petitioner did not cite the statutory or regulatory provisions addressing timely motions to reopen, see 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), and she did not attempt to explain how she met the standards for reopening set out in those provisions, *i.e.*, that she provided new, material evidence that was previously unavailable. Under those circumstances, the court of appeals took petitioner at her word, treated her motion as a request for *sua sponte* reopening, and then held (based on settled precedent) that the Board's denial of *sua sponte* reopening is unreviewable.

Whether petitioner's motion filing with the Board is construed as a request for *sua sponte* reopening under 8 C.F.R. 1003.2(a) or a motion seeking reopening based on new, material, and previously unavailable evidence under 8 C.F.R. 1003.2(c), the court of appeals' decision is correct.

a. To the extent that petitioner's filing is understood as having sought *sua sponte* reopening, the court correctly held that the Board's denial of *sua sponte* reopening is not judicially reviewable. Relying on its prior en banc opinion in *Tamenut* v. *Mukasey*, 521 F.3d 1000 (8th Cir. 2008) (per curiam), the court explained that the decision whether to reopen removal proceedings *sua sponte* is unreviewable because it is committed to the Board's discretion by law. Pet. App. 6a. As the court explained, under the Administrative Procedure Act, judicial review is not available when "agency action is committed to agency discretion by law," 5 U.S.C. 701(a)(2), and that is true with respect to *sua sponte* reopening, because the decision whether to reopen a case is entirely discretionary and there are no meaningful standards or guidelines to review the Board's decision. Pet. App. 6a-8a; see *Tamenut*, 521 F.3d at 1003 (explaining that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)). Furthermore, unlike the statutory and regulatory provisions allowing an alien to file one motion to reopen, the regulation permitting the Board to reopen a case on its own motion establishes a procedural mechanism for the Board itself in aid of its own internal administration. It does not confer any privately enforceable rights on an alien. See *Lenis* v. *United States Att'y Gen.*, 525 F.3d

1291, 1294 (11th Cir. 2008) (the regulation permitting *sua sponte* reopening "merely provides the [Board] the discretion to reopen immigration proceedings as it sees fit") (citation omitted). Accordingly, the Board's decision whether to reopen proceedings *sua sponte* is committed to agency discretion by law and is not reviewable by a court.

Petitioner contends (Pet. 11-12, 21-25) that the court of appeals' holding that Board determinations not to reopen a case on its own motion are unreviewable cannot be reconciled with this Court's recent decision in *Kucana* v. *Holder*, 130 S. Ct. 827, 834 (2010). She is mistaken, because *Kucana* did not address judicial review of a denial of *sua sponte* reopening. The question in *Kucana* was one of statutory interpretation: whether 8 U.S.C. 1252(a)(2)(B)(ii), which states that no court shall have jurisdiction to review any action of the Attorney General "the authority for which is specified under this subchapter to be in the discretion of the Attorney General," applies to actions the discretionary authority for which is specified in *regulations*, rather than the relevant statutory subchapter. 130 S. Ct. at 831. The Court concluded that Section 1252(a)(2)(B)(ii) does not bar judicial review of determinations that are made discretionary by regulation, such as determinations on an alien's motion to reopen. *Id.* at 836-837.

In the decision below, the reviewability of the Board's decision did not depend on Section 1252(a)(2)(B)(ii), the statutory provision at issue in *Kucana*. Instead, the court of appeals held that the Board's decision not to reopen a case *sua sponte* is unreviewable because it is committed to agency discretion by law, an issue that was not addressed in *Kucana*. Pet. App. 6a-8a. Indeed, the *Kucana* Court specifically

stated that it "express[ed] no opinion on whether federal courts may review the Board's decision not to reopen removal proceedings *sua sponte*," although it did note that eleven courts of appeals had held that "such decisions are unreviewable because *sua sponte* reopening is committed to agency discretion by law." 130 S. Ct. at 839 n.18 (citing *Tamenut*, 521 F.3d at 1003-1004). Contrary to petitioner's contention (Pet. 22), *Kucana*'s "logic" does not lead to the conclusion that denials of *sua sponte* reopening are reviewable, because that question turns on whether the regulations confer private rights and whether there are meaningful standards to guide agency decisionmaking, while the issue in *Kucana* was one of the interpretation of the language of a statutory provision, 8 U.S.C. 1252(a)(2)(B)(ii).

Petitioner suggests (Pet. 2) that even if decisions not to reopen *sua sponte* generally are unreviewable because they are committed to agency discretion by law, her challenge to the Board's denial of reopening turns on "application of familiar * * * legal standards concerning ineffective assistance of counsel." Petitioner did not present that argument to the court of appeals, and this Court should not consider it in the first instance. Petitioner did not address the reviewability of denials of *sua sponte* reopening in her brief to the court of appeals, and her petition for rehearing argued only that her motion was not one seeking *sua sponte* reopening; that the Board abused its discretion in denying her motion to reopen; and that the court's holding that denials of *sua sponte* reopening are unreviewable is inconsistent with *Kucana*. C.A. Pet. for Reh'g 6-15. Notably, petitioner did not argue that there is an exception to the general rule that decisions not to reopen *sua sponte* are unreviewable when the challenge involves the "application of

familiar * * * legal standards." Accordingly, this case raises no issue about exceptions to the general rule that denials of *sua sponte* reopening are unreviewable.[1]

b. Alternatively, if petitioner's motion to reopen is treated as a timely filed motion to reopen based on new, material, and previously unavailable evidence under 8 C.F.R. 1003.2(c), the court's decision also would be correct. That is because the court held in the alternative that the Board did not abuse its broad discretion in denying the motion to reopen since petitioner failed to

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[1] In any event, petitioner is mistaken in suggesting there is such an exception to the general rule. It is true that the INA defines certain limitations on judicial review in 8 U.S.C. 1252(a)(2)(A)-(C)—such as the limitation at issue in *Kucana*—and then provides in 8 U.S.C. 1252(a)(2)(D) that "[n]othing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review." Petitioner does not rely on Section 1252(a)(2)(D) in her petition, but it would not aid her in any event. Section 1252(a)(2)(D) does not apply here by its plain text. It provides a rule of construction for certain provisions of the INA that "limit[] or eliminate[] judicial review." 8 U.S.C. 1252(a)(2)(D). Board determinations not to reopen *sua sponte* are not made unreviewable due to a provision in Section 1252(a) or elsewhere in the relevant chapter of the United States Code. Instead, they are unreviewable as committed to agency discretion by law, both because the regulations allowing the Board to reopen or reconsider a case on its *own* motion create no privately enforceable right, and because there are no judicially manageable standards to evaluate the agency's exercise of its own internal discretion. See pp. 11-12, *supra*.

Even assuming that Section 1252(a)(2)(D) applies to matters that are committed to agency discretion by law, petitioner does not raise any colorable legal issue. Her disagreement with the Board is not one about the meaning of a statute or regulation; instead, she quarrels with the Board's application of legal standards to the facts of her particular case. See, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.), cert. denied, 548 U.S. 906 (2006).

meet her heavy burden of demonstrating that she suffered prejudice as a result of the acts or omissions of her previous counsel. Pet. App. 8a n.4.

It is well-established that the denial of a timely motion for reopening is reviewed for abuse of discretion. See, *e.g.*, *Kucana*, 130 S. Ct. at 834; *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). "An abuse of discretion occurs if a decision is without rational explanation, departs from established policies, invidiously discriminates against a particular race or group, or where the agency fails to consider all factors presented by the alien or distorts important aspects of the claim." *Feleke* v. *INS*, 118 F.3d 594, 598 (8th Cir. 1997).

The Board did not abuse its discretion in concluding that petitioner failed to demonstrate ineffective assistance of counsel that prejudiced her case. The Board reviewed the evidence petitioner presented and concluded that she suffered no prejudice. Petitioner herself admitted that "she did not think the lead poisoning issue was necessary to her case" and that "she did not say anything to her attorney about it." Pet. App. 29a. Further, after the IJ denied her claim of exceptional and extremely unusual hardship, petitioner did not augment the record with documentation that would support her claim. A.R. 198 (noting that "[e]ven now on appeal, [petitioner] has provided no evidence in support of her contention"). As the Board explained, the documents petitioner submitted with her motion to reopen did not show the requisite hardship; indeed, those documents showed that her son's "lead levels have diminished and at the last lead level reading in 2002, his levels were in the normal range." Pet. App. 29a. Further, even if those documents had substantiated her son's medical issues, petitioner did not show that her son would suffer "excep-

tional and extremely unusual hardship" if she were removed, 8 U.S.C. 1229b(b)(1)(D), by, for example, demonstrating that taking her son to Mexico would exacerbate his medical issues, or that his learning disabilities could not be addressed in Mexican schools. Although petitioner alleged that she was prejudiced by her attorney's failure to present such evidence in her motion to reopen, Pet. App. 26a, she did not substantiate that claim. Because petitioner did not demonstrate a reasonable probability that she would have received cancellation of removal if her former counsel had submitted the evidence at her hearing, the Board did not abuse its discretion in denying the motion to reopen. See *Obleshchenko* v. *Ashcroft*, 392 F.3d 970, 972 (8th Cir. 2004).

c. Petitioner asserts (Pet. 34) that the court of appeals' construction of her filing with the Board as a request that the Board's exercise its *sua sponte* reopening authority is not plausible. This contention is open to debate, given that petitioner invoked the Board's *sua sponte* authority and cited 8 C.F.R. 1003.2(a), rather than the provisions governing a motion based on new, material, and previously unavailable evidence, 8 U.S.C. 1229a(c)(7)(B) and 8 C.F.R. 1003.2(c)(1). (Indeed, even the judge who believed the Board's decision was reviewable characterized petitioner's motion as "not clear" and "grammatically incoherent." Pet. App. 10a (Colloton, J., concurring in part and dissenting in part).) But it ultimately does not matter, because the court of appeals considered both possible constructions of petitioner's submission, and its decision to uphold the Board's denial of reopening is correct. As petitioner herself acknowledges (Pet. 30), the court of appeals "stated that it would have reached the same result even if" petitioner's motion were properly characterized as

one seeking reopening for new, material, previously unavailable evidence under 8 C.F.R. 1003.2(c).

2. Contrary to petitioner's contention (Pet. 15-30), the decision below does not conflict with any decisions from other circuits regarding whether denials of *sua sponte* are judicially unreviewable. The courts of appeals have uniformly held that denials of *sua sponte* reopening are not reviewable. Indeed, in *Tamenut*, the Eighth Circuit joined the "[t]en courts of appeals" that had found "no meaningful standard against which to judge the agency's exercise of discretion" and had "held that the BIA's decision whether to reopen proceedings on its own motion is committed to agency discretion by law." 521 F.3d at 1004 (citing *Luis* v. *INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali* v. *Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006) (per curiam); *Calle-Vujiles* v. *Ashcroft*, 320 F.3d 472, 474-475 (3d Cir. 2003); *Doh* v. *Gonzales*, 193 Fed. Appx. 245, 246 (4th Cir. 2006) (per curiam); *Enriquez-Alvarado* v. *Ashcroft*, 371 F.3d 246, 248-250 (5th Cir. 2004); *Harchenko* v. *INS*, 379 F.3d 405, 410-411 (6th Cir. 2004); *Pilch* v. *Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Ekimian* v. *INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru* v. *INS*, 327 F.3d 998, 1000-1001 (10th Cir. 2003); *Anin* v. *Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999) (per curiam)); see also *Mosere* v. *Mukasey*, 552 F.3d 397, 401 (4th Cir.), cert. denied, 130 S. Ct. 137 (2009).[2]

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[2] The courts of appeals that have addressed the issue post-*Kucana* (including the Eighth Circuit in this case) have adhered to the view that denials of *sua sponte* reopening are unreviewable. See *Mejia-Hernandez* v. *Holder*, 633 F.3d 818, 823-824 (9th Cir. 2011); *Neves* v. *Holder*, 613 F.3d 30, 35 (1st Cir. 2010) (per curiam), petition for cert. pending, No. 10-1030 (filed Feb. 14, 2011); *Gor* v. *Holder*, 607 F.3d 180, 188 (6th Cir. 2010), petition for cert. pending, No. 10-940 (filed Jan. 18,

Petitioner contends (Pet. 16-18) that there is disagreement in the circuits because some courts would make an exception to this general rule for challenges to denials of *sua sponte* reopening that raise "questions of law." But the court in this case did not opine on that question. The court held that denials of *sua sponte* reopening are unreviewable, and it did not separately address whether that general rule would apply when an alien raises a question of law. Pet. App. 6a-8a. Petitioner did not argue for any such exception before the court of appeals or explain how her case raised a discrete legal question that would fit the exception. See pp. 13-14, *supra*. Accordingly, this case does not raise the question whether a Board decision not to reopen a case *sua sponte* is reviewable when it raises a question of law.[3]

3. Petitioner contends (Pet. 30-34) that the court of appeals' decision conflicts with this Court's decision in

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2011); *Ozeiry* v. *Attorney Gen.*, 400 Fed. Appx. 647, 649-650 (3d Cir. 2010) (unpublished); *Gashi* v. *Holder*, 382 Fed. Appx. 21, 22-23 (2d Cir. 2010) (unpublished); *Jaimes-Aguirre* v. *United States Att'y Gen.*, 369 Fed. Appx. 101, 103 (11th Cir. 2010) (unpublished).

[3] In any event, it is far from clear that there is disagreement in the circuits on this point. The decisions of the Fourth and Sixth Circuits petitioner cites (Pet. 17) as evidence of a purported conflict state that decisions not to reopen *sua sponte* are unreviewable, but like the decision below, they say nothing about whether there should be an exception for challenges that raise "questions of law." See *Mosere*, 552 F.3d at 400-401; *Gor*, 607 F.3d at 186-187. Moreover, even if some courts reviewed decisions not to reopen *sua sponte* that raised "questions of law," petitioner's case does not raise such an issue. By her own characterization (Pet. 2, 16), petitioner's case involves the application of settled legal principles to the particular facts of her case, not a question of the meaning of a law or regulation. See also pp. 13-14 & note 1, *supra*.

SEC v. *Chenery Corp*, 332 U.S. 194 (1947). In *Chenery*, the Court explained that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Id.* at 196. In petitioner's view, the court of appeals' construction of her motion to reopen as a request for *sua sponte* reopening violates that rule. See Pet. 30-34. Petitioner is mistaken, for essentially three reasons.

First, the court of appeals considered petitioner's submission *both* as one requesting *sua sponte* reopening and as one moving for reopening based on new, material, and previously unavailable evidence. The court determined that a decision not to reopen *sua sponte* was unreviewable, Pet. App. 6a-8a, and that a denial of a motion seeking reopening based on new evidence was not an abuse of discretion because petitioner failed to carry her burden to justify reopening, *id.* at 8a n.4. Thus, this is not a case in which a court attempted to usurp "the domain which Congress has set aside exclusively for the administrative agency," *Chenery*, 332 U.S. at 196; instead, the court was understandably uncertain about the import of petitioner's filing with the Board and therefore covered all of the bases in its ruling. That is a far cry from the interference in agency decision-making envisioned in *Chenery*.[4]

Second, "the *Chenery* doctrine is not applied inflexibly," and it "does not require a remand to the agency if it is clear that the agency would have reached the same

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[4] Moreover, because the court of appeals ruled in the alternative and did review the reasoning set out by the Board, its decision does not conflict with the decisions of other courts (see Pet. 33-34) in which the courts remanded matters to the agency.

ultimate result had it considered the new ground." *Fleshman* v. *West*, 138 F.3d 1429, 1433 (Fed. Cir.) (internal quotation marks and citation omitted), cert. denied, 525 U.S. 947 (1998); see *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969). In this case, the Board reviewed the record, including the documents submitted with the motion to reopen, and concluded that petitioner failed to demonstrate ineffective assistance of counsel that prejudiced her case. Pet. App. 29a. There is no reason to believe that the Board's conclusion would have been different if the case had been remanded. Whether to reopen a case *sua sponte* is entrusted to the discretion of the Board. 8 C.F.R. 1003.2(a). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999). In light of the fact that the Board found no ineffective assistance of counsel here, there is no reason to believe its decision would change if the case were remanded and it considered a request for *sua sponte* reopening.

Finally, this would be a poor case for considering the reach of *Chenery*, because any *Chenery* issue petitioner identifies is one of her own making. Petitioner's filing with the Board was confusing on its face: although it was timely filed, it requested that the Board reopen the case "on their own motion" and invoked the regulation governing *sua sponte* reopening. Pet. App. 22a. Moreover, petitioner made no attempt to show new, material, and previously unavailable evidence in the motion, as generally would be required for granting a timely motion to reopen. Under those circumstances, the court

was uncertain and attempted to cover all of the bases in assessing petitioner's claims.

4. This case would be a poor vehicle to consider the question presented in any event, for several reasons. First, it is not clear whether petitioner was requesting *sua sponte* reopening or moving for reopening based on new, material, and previously unavailable evidence. The question petitioner attempts to present about the reviewability of denials of *sua sponte* reopening arises only if her filing actually was one seeking *sua sponte* reopening. Because that was unclear below, and because the court of appeals ruled in the alternative, there is no occasion for the Court to reach out to decide a question about reviewability that need not actually be decided in this case.

Similarly, the second question petitioner attempts to present again is complicated by the lack of clarity in her motion to the Board. Any *Chenery* issue is a direct consequence of the fact that petitioner's filing was unclear. For that reason, the Court should not reach out to address the second question petitioner attempts to present.

Finally, petitioner would be extremely unlikely to obtain the relief she ultimately seeks—discretionary cancellation of removal—because she has overstayed her period of voluntary departure. As petitioner acknowledges (Pet. 4), in proceedings before the administrative agency, petitioner requested voluntary departure in lieu of removal pursuant to 8 U.S.C. 1229c(b)(1), and the Board ultimately granted her 60 days from the date of her removal order to depart the United States voluntarily in lieu of removal. A.R. 198-199. The decisions of both the IJ and the Board specifically warned petitioner of the consequences of failing to comply with

her voluntary departure order, including the consequence that she would be ineligible to seek discretionary cancellation of removal for a period of ten years. A.R. 198-199, 249-250, 312.

To the best of the government's knowledge, petitioner did not voluntarily depart the United States within the time permitted. That failure to abide by the agency's orders makes it very unlikely she could obtain cancellation of removal. The INA provides that an alien who is permitted to depart voluntarily but fails to do so is ineligible for cancellation of removal for a period of ten years. See 8 U.S.C. 1229c(d)(1)(B). Although the Board has decided that the categorical bar does not apply to an alien who was granted voluntary departure prior to 2009 and did not post a voluntary departure bond, *In re Diaz-Ruacho*, 24 I. & N. Dec. 47, 50-51 (B.I.A. 2006), and petitioner may well fit into that category, at the very least, the failure to abide by the agency's orders would be a significant negative equity weighing against a grant of discretionary cancellation of removal. See *INS* v. *Rios-Pineda*, 471 U.S. 444, 451 (1985); *Diaz-Ruacho*, 24 I. & N. Dec. at 51; see also, *e.g.*, *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (applicant for cancellation must show she warrants relief as a matter of discretion, which depends on a balancing of positive and negative equities). Accordingly, petitioner likely cannot obtain cancellation of removal in any event. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2011



No. 10-920

In the Supreme Court of the United States

ANA ROSA OCHOA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred by holding—consistent with two other circuits and in conflict with at least four other circuits—that federal courts are categorically incompetent to review a Board of Immigration Appeals decision denying a motion to reopen removal proceedings *sua sponte*, even where that decision applies a legal standard, on the ground that such decisions are "committed to agency discretion by law." 5 U.S.C. §701(a)(2).

2. Whether the Eighth Circuit erred by disregarding the BIA's stated grounds for its decision, in conflict with *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and the decisions of other circuits.

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ARGUMENT

I. The government concedes that the court of appeals reviewed petitioner's motion *de novo* and construed it as a motion to reopen *sua sponte* (Opp.8, Opp.10), even though the court recognized that "the Board appeared to treat the motion as a timely motion seeking reopening based on new evidence" (Opp.8). But *Chenery* forbids a court to substitute its own judgment for the agency's on a matter entrusted to the agency's discretion. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). There is perhaps no plainer, or more fundamental, principle of administrative law. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (summarily reversing where court of appeals had "'conduct[ed] a *de novo* inquiry into the matter being reviewed'" instead of "'remand[ing] to the agency for additional investigation of explanation'" under *Chenery*). Perhaps that is why, on rehearing, the government declined to defend this aspect of the Eighth Circuit's decision. *See* App.17a (Colloton, J., dissenting).

The government now argues that this plain violation of *Chenery* does not matter because petitioner invited the error (Opp.21); and, alternatively, that *Chenery* does not require a remand when the agency is likely to reach the "'same ultimate result'" on remand (Opp.19-20). The government is mistaken on both counts.

1. The government argues that the Eighth Circuit's error should be excused because the court was "understandably uncertain about how to characterize petitioner's motion." Opp.10; Opp.19 (same); Opp.20 (any *Chenery* error "is one of [petitioner's] own making"); Opp.21 ("Any *Chenery* issue is a direct consequence of the fact that

petitioner's filing was unclear."). This argument misses the point: the Eighth Circuit had no business "characteriz[ing] petitioner's motion" in the first place. If the court of appeals was confused about the basis of BIA's decision denying reopening, it was required by *Chenery* to remand the case for clarification about *the ground of BIA's decision*—so that the court of appeals could later determine, based on the agency's actual rationale, whether its decision was reviewable for abuse of discretion (per *Kucana v. Holder*, 130 S.Ct. 827 (2010)), or not (per *Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008)). *See, e.g., Negusie v. Holder*, 129 S.Ct. 1159, 1167-68 (2009); *Chenery*, 332 U.S. at 196.

The Eighth Circuit's determination to construe petitioner's motion *de novo* also conflicts squarely with the decisions of other circuits remanding to BIA for further explanation in virtually identical circumstances. *See Cruz v. Att'y Gen.*, 452 F.3d 240, 250 (3d Cir. 2006) (remanding where it was unclear "whether the BIA declined to exercise its *sua sponte* authority on a reviewable or non-reviewable basis"); *Haoud v. Ashcroft*, 350 F.3d 201, 205, 207-08 (1st Cir. 2003) (remanding for clarification of the grounds of BIA's decision); *Pllumi v. Att'y Gen.*, ---F.3d---, No.09-4454, 2011 WL 1278741, at *6 (3d Cir. Apr. 6, 2011) (remanding "for clarification of the basis for its decision declining to exercise its discretion to reopen"); *see* Pet.32-33.

The Solicitor General does not hesitate to request summary reversal for similar *Chenery* transgressions when the shoe is on the other foot. *See, e.g., Gonzales v. Thomas*, 547 U.S. 183, 185 (2006); *Ventura*, 537 U.S. at 16. This fundamental limitation on judicial power

should apply with as much force here as it does when the *government* is seeking a remand. Pet.32-33.

2. The government also contends that *Chenery* did not require a remand because "it is clear that the agency would have reached the same ultimate result had it considered the new ground." Opp.19-20 (quoting *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998)); *see* Opp.20 ("There is no reason to believe that the Board's conclusion would have been different if the case had been remanded."). That argument profoundly misapprehends *Chenery* (and the issues in this case).

If the government actually means to suggest that *Chenery* does not require remand whenever, in the court's judgment, the party seeking remand is not likely to obtain ultimate relief, it is badly mistaken. There is no support in law for such an ad hoc, "flexible" (Opp.19) exception to *Chenery*. It is well settled that *Chenery* applies even where the agency is very likely to reach the same result on remand. *FEC v. Akins*, 524 U.S. 11, 25 (1998) (remand under *Chenery* required "even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason"). The government's contrary approach would obliterate the rule.

To be sure, *Chenery* does not require a remand where the ultimate outcome of proceedings is *compelled* by statute or Supreme Court precedent, such that the agency lacked discretion to reach a different result. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544-45 (2008) (upholding FERC order on basis raised by agency for the first time on appeal because result was *compelled*

by law).[1] But the government does not argue—and the Eighth Circuit did not hold—that the Board was *required* to treat petitioner's motion as one invoking solely its *sua sponte* reopening authority. To the contrary, the government asserts that the basis of petitioner's timely motion was "unclear."[2]

Plenary review is warranted to restore uniformity in this important area of administrative law. Because the Eighth Circuit's error was blatant in light of *Ventura* and *Thomas*, summary reversal also would be appropriate.

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[1] The government's passing reference (Opp.19) to *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (plurality), is inapt. The plurality rejected a dissenter's suggestion that *Chenery* required a remand where the adjudicative order under review merely referred to an invalid rule but was itself indisputably a proper and reasoned exercise of the Board's authority. *Id.* at 763-67 & n.6. That portion of *Wyman-Gordon* has been cited by this Court exactly once since then (*Morgan Stanley*).

[2] In truth, it is perfectly clear that the BIA recognized petitioner's motion to reopen as based on new evidence per §1003.2(c). The Board found that petitioner "filed a timely motion to reopen ... based upon ineffective assistance of counsel and her son's medical condition." Pet.App.28a. As the Board and the courts have uniformly recognized, "[c]laims of ineffective assistance of counsel satisfy [§1003.2(c)'s] requirement that motions to reopen present 'new facts' that are 'material and [were] not available and could not have been discovered or presented at the former hearing.'" *Iavorski v. U.S. INS*, 232 F.3d 124, 129 (2d Cir. 2000); *see also* U.S.Br.11, *Li v. Holder*, No. 09-157 (filed Nov. 9, 2009) (noting that ineffective assistance claims like petitioner's "are most often presented in the context of motions" to reopen under §1003.2(c)). *Contra* Opp.10. The courts of appeals have reviewed scores of BIA decisions involving such claims. *E.g.*, *Habchy v. Gonzales*, 471 F.3d 858 (8th Cir. 2006).

II. The government tries to downplay the sharp disagreements among the court of appeals over the reviewability of the BIA's *sua sponte* reopening decisions by suggesting that the Eighth Circuit has not foreclosed review in all such circumstances. The government also suggests that this is not a suitable vehicle for reviewing the issue. Neither argument is persuasive. The Eighth Circuit squarely held that the BIA's decision denying petitioner's motion to reopen was unreviewable because it is "committed to agency discretion by law" under 5 U.S.C. §701(a)(2), citing its previous en banc decision in *Tamenut*. Pet.App.7a-8a. And *Tamenut* makes crystal clear the circuit's view that the Board's *sua sponte* decisions are *categorically* beyond appellate scrutiny, thereby aligning itself with the Fourth and Sixth Circuits in conflict with decisions of at least three other courts of appeals.

Amici curiae—fifteen prominent administrative law scholars, including authors of the leading case book and treatise on the subject—explain that this conflict reflects profound and longstanding confusion in the lower courts about how to determine whether agency action falls within §701(a)(2)'s bar. *Amici* strongly urge this Court to grant review to provide much-needed and long overdue guidance to the courts of appeals on the proper framework for determining whether a decision is "committed to agency discretion by law." The government has no response whatsoever to *amici*'s demonstration of the need for this Court's intervention, and its various attacks on the suitability of this case as a vehicle for addressing the question are misguided.

1. The First, Second, and Third Circuits have held that the reviewability of BIA's *sua sponte*

reopening decisions depends on the *character* of that decision, and will review such decisions to the extent they raise questions susceptible to ordinary abuse-of-discretion review. Pet.17-18. The Third Circuit has recently reiterated that view. *Pllumi*, 2011 WL 1278741, at *6 (reviewing BIA's denial of *sua sponte* reopening, where it appeared BIA's decision may have rested on a misunderstanding of law). The Seventh Circuit also has strongly suggested it agrees, stating that it would review for abuse of discretion any time the BIA has applied "a legal standard." *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006), *cert. denied*, 552 U.S. 826 (2007). The government remarkably fails even to cite these cases in its brief, and its half-hearted effort to persuade this Court that there is no circuit conflict is unavailing.

Notwithstanding the unequivocal holdings of the Fourth, Sixth, and Eighth Circuits that courts may not review BIA *sua sponte* decisions, the government suggests that it is not entirely clear whether those courts would craft an exception for "questions of law." Opp.18 & n.3. There is nothing to suggest that they would. The Eighth Circuit held review was barred in this case, without considering the character of the BIA's decision, because under *Tamenut* it simply does not matter.

The government does not deny that at least three circuits approach this question by considering the character of the individual decision and whether there is "law to apply" under *Heckler*. In any of those circuits, the BIA's decision in this case purporting to apply the legal framework set out in *Matter of Lozada* and *Matter of Coelho* would have been reviewed for

abuse of discretion.[3] In the Fourth, Sixth, and Eighth Circuits, however, review is categorically barred, based solely on the Attorney General's regulation (the subject of *Kucana*) indicating that the BIA has discretion over such matters. The conflict is real, and makes a difference in this case.

2. The government argues that *Kucana* has no bearing on this question, because that case addressed whether IIRIRA barred review and in this case whether BIA's decision is reviewable under the APA "turns on whether the regulations confer private rights and whether there are meaningful standards to guide agency decisionmaking." Opp.13. The government once again misses the point. In deciding that IIRIRA did not eliminate judicial review, *Kucana* cited favorably, and relied on, the long line of precedent establishing the general reviewability of BIA's reopening decisions. And there is no less a "private right" at stake, and no less a "meaningful standard[] to guide agency decisionmaking," when the BIA considers whether to reopen in response to a motion invoking its *sua sponte* authority.

Nothing in 8 C.F.R. §1003.2(c) "confer[s] any privately enforceable rights" that could distinguish ordinary reopening requests from those invoking the Board's "*sua sponte*" authority. Regulation 1003.2(c) sets forth circumstances in which a timely motion to

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[3] The government wrongly suggests (Opp 18n.3) that the BIA's decision here would not be reviewable in those circuits because petitioner challenges "application of settled legal principles" instead of "the meaning of a law or regulation." *See Cevilla*, 446 F.3d at 660-61 (explaining that "no law to apply" doctrine does not bar review of "the application of a legal standard"). *Heckler* provides no basis for such a distinction.

reopen "shall *not*" be granted. It does not purport to limit the Board's discretion to deny relief in any particular case.

Similarly, §1003.2(a), which confers on the BIA discretion to grant or deny a motion to reopen, applies equally to *sua sponte* consideration and ordinary motions to reopen. This Court in *Kucana* recognized that although "[t]he BIA has broad discretion ... 'to grant or deny a motion to reopen,' 8 C.F.R. §1003.2(a)," "courts retain jurisdiction to review, with due respect, the Board's decision." 130 S.Ct. at 838. But if the government is correct that the character of the Attorney General's regulations and the absence of a conferred "right" render *sua sponte* decisions unreviewable, then *Kucana* must have been wrong about the reviewability of general reopening decisions, because all of BIA's decisions involving motions to reopen—including the decision at issue in *Kucana*—would be unreviewable under §701(a)(2), notwithstanding this Court's holding that IIRIRA preserves appellate *jurisdiction* to review them. Pet.22-23. That would be a dramatic departure from settled law, as "[f]ederal-court review of administrative decisions denying motions to reopen removal proceedings dates back to at least 1916." *Kucana*, 130 S.Ct. at 834.

At least two courts of appeals have explicitly acknowledged that *Kucana* casts doubt on the viability of circuit decisions holding that *sua sponte* reopening decisions are unreviewable; those courts nevertheless have found themselves bound by their precedent because, as noted, *Kucana* reserved judgment on the question. *See Mejia Hernandez v. Holder*, 633 F.3d 818, 823 (9th Cir. 2011) ("The overall thrust of *Kucana*

suggests that *sua sponte* reopening should be subject to review. ... Were this an issue of first impression, a right to review might be recognized."); *Gor v. Holder*, 607 F.3d 180, 188 (6th Cir. 2010) ("[*Heckler*] does not support a conclusion that an *agency* can strip a court of jurisdiction to review its own actions by enacting regulations that deem these actions discretionary."), *petition for cert. pending*, No. 10-940 (filed Jan. 18, 2011). This Court should grant certiorari now to address that question.

3. The government's suggestion (Opp.13-14, 18) that petitioner somehow failed adequately to preserve her argument that BIA decisions applying a legal framework afford ample "law to apply" is meritless. As explained in the petition, because the government *conceded* on appeal that the BIA's order was reviewable for abuse of discretion, petitioner had no reason to anticipate the court of appeals' uninvited holding that review was barred by *Tamenut*. Petitioner then argued on rehearing that the Eighth Circuit's holding "misconstrues *Heckler*" and should be reconsidered in light of *Kucana*. Pet'n for Reh'g 1-2, 12-15. There is no preservation problem here. *Herndon v. Georgia*, 295 U.S. 441, 444 (1935); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

4. The government's other supposed "vehicle problems" are equally unavailing. The government's suggestion that the presence of the "*Chenery* issue" makes this case an undesirable vehicle to consider the Eighth Circuit's reviewability holding is absurd. If the Acting Solicitor General agrees with Judge Colloton that the panel violated *Chenery*, then he should have confessed error and recommended summary reversal on that ground. Having chosen to defend the court of

appeals' decision to construe petitioner's motion, however, the government cannot have its cake and eat it too.[4] The court of appeals squarely held that BIA's denial of a motion to reopen *sua sponte* is categorically unreviewable. Petitioner seeks review of that holding. That it "is not clear whether petitioner was requesting *sua sponte* reopening" (Opp.21) only heightens the need for this Court's review. The Eighth Circuit here applied its categorical rule notwithstanding that there is no substantive difference between the BIA's order in this case and its orders in scores of cases that are reviewable under *Kucana*. And for the reasons stated by Judge Colloton, petitioner's challenge to that cursory, unreasoned order has substantial merit. That makes this case a compelling vehicle.[5]

Equally flawed is the government's suggestion that this is not a suitable vehicle because the court of appeals "covered [its] bases" (Opp.19) by holding "in the alternative" that the Board did not abuse its discretion. Opp.14-15. The Eighth Circuit did not so hold. Indeed, any alternative "holding" that the BIA did not abuse its discretion would be logically inconsistent with the court's unequivocal holding that the BIA's decision is unreviewable because there is (purportedly) "no law to apply." Certainly Judge Colloton did not understand the majority to have

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[4] The Court would fail to reach that question *only if* it agrees with petitioner that the court of appeals violated *Chenery*. Either way, the Court would reach at least one of the two questions presented.

[5] Two other pending petitions, No. 10-940, *Gor v. Holder*, and No. 10-1039, *Neves v. Holder*, raise the *Heckler/Kucana* reviewability issue. If this Court grants certiorari in either of those cases, it should grant this case and consolidate them.

articulated an alternative holding. Pet.App.8a-14a. The court of appeals did acknowledge a "possibl[e] argu[ment]" that, "*if* [BIA had] indeed" treated a *sua sponte* motion "as one filed under §1003.2(c)," there would be a "plausible meaningful standard we would normally find lacking in the *sua sponte* context." Pet.App.8a n.4 (emphasis added). Such hypothetical musings are no basis upon which to deny review in this case, given the unequivocal holding of the en banc Eighth Circuit in *Tamenut* that the character of §1003.2(a) renders these decisions categorically unreviewable. 521 F.3d at 1004-05.

Finally, the government's suggestion that petitioner is unlikely to obtain the relief she seeks is utterly baseless and, in any event, provides no reason to deny review of the exceptionally important questions presented here. This Court can reach both questions presented regardless of whether petitioner ultimately will be granted cancellation upon an eventual remand to the Board. Moreover, petitioner has not "overstayed her period of voluntary departure." *Contra* Opp.21. As the government acknowledges (Opp.22), under *Matter of Diaz-Ruacho*, 24 I.&N. Dec. 47 (B.I.A. 2006), petitioner's voluntary departure order is void because she did not post bond; instead, she and her former counsel filed a timely motion to reopen before the departure period expired. *Cf. Dada v. Mukasey*, 554 U.S. 1, 21 (2008). As the Board itself recognizes, in these circumstances petitioner is not subject to any penalties for staying in the United States to pursue humanitarian relief for the benefit of her disabled U.S. citizen child. 8 C.F.R. §1240.26(e)(1).

CONCLUSION

The petition should be granted, and the case should be set for argument or summarily reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

ANA ROSA OCHOA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR ADMINISTRATIVE LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF THE AMICI CURIAE

The parties were notified and their consent to the filing of this brief was lodged with the Clerk of this Court in accordance with Supreme Court Rule 37.[1]

Amici Curiae are law professors who research, teach, and write on federal administrative law. The first issue presented in this case would answer an important question expressly left open in footnote 18 in *Kucana v. Holder*, 130 S. Ct. 827, 839 (2010) ("We express no opinion on whether federal courts may review the Board's decision not to reopen removal proceedings *sua sponte*."). Resolving this issue would provide much-needed clarification in a muddled area of the law.

Of particular interest to Amici Curiae is that, by answering that question, this case could provide guidance as to when an agency action is not reviewable by a court because it "is committed to agency discretion by law." 5 U.S.C. §701(a)(2) (2010). This particular exception has been difficult for lower courts to apply consistently. Amici Curiae are interested in the development of a more consistent and workable standard

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[1] In accordance with Supreme Court Rule 37.6, Amici Curiae certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than Amici Curiae, has made a monetary contribution specifically for the preparation or submission of this brief

for applying Section 701(a)(2). More information about the specific interest of each law professor is provided below.

Jonathan H. Adler is Professor of Law and Director of the Center for Business Law & Regulation at the Case Western Reserve University School of Law, where he teaches courses in administrative, environmental, and constitutional law. Much of his scholarship focuses on questions of administrative law and agency action, including *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 UNIVERSITY OF ILLINOIS LAW REVIEW 101 (2009) (co-authored with Nathan Sales).

Professor Bill Araiza is Professor of Law at Brooklyn Law School. His teaching and scholarly interests are in administrative and constitutional law, and he has published widely in these areas. He has served as a board member of the Western Law Center for Disability Rights in Los Angeles, and is a member of the Los Angeles County Bar's Sexual Orientation Bias Committee, and is currently on the Rulemaking Committee of the American Bar Association's Section on Administrative Law.

Jack M. Beermann is Professor of Law and Harry Elwood Warren Scholar at Boston University School of Law and is a Visiting Professor of Law at Harvard Law School for Spring 2011. Professor Beermann is a co-author of a leading administrative law casebook

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STATEMENT

1. The law on the reviewability of administrative decisions began early in this nation's history. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court carefully noted that what compelled the result was a statute that assigned a specific duty – the provision of a commission to anyone appointed by

the President as a justice of the peace – to the Secretary of State. *See id.* at 166. The Court made clear, however, that its job was "not to enquire how the executive, or executive officers, perform duties in which they have discretion." *Id.* at 170. This important distinction resulted in a presumption against reviewability of agency action throughout the nineteenth century. *See* RICHARD J. PIERCE, JR., 3 ADMINISTRATIVE LAW TREATISE §17.5, at 1582-84 (5th ed. 2010).

In 1902, however, the Court changed course in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94. Permitting review of a Postmaster's fraud order, the Court explained:

> That the conduct of the postoffice is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that Department. . . . The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.

Id. at 108. The Court subsequently found a series of administrative decisions reviewable. *See, e.g., Dismuke v. United States*, 297 U.S. 167 (1936) (allowing judicial review of determination whether certain service qualified individual for retirement benefits); *Shield v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177 (1938)

(permitting judicial review of whether railroad was an "interurban electric railway," which would exempt railroad from certain labor requirements).

Despite these signals toward permitting more judicial review, the Court never firmly denounced the presumption against judicial reviewability. As a result, Professor Richard Pierce describes this period as one in which there was "no presumption either way." *See* PIERCE, §17.6, at 1591. It appears that the Court was open to judicial review in some situations – particularly when issues of statutory interpretation were at issue, *see Stark v. Wickard*, 321 U.S. 288 (1944) – but was closed to it in others – particularly where, among other things, the relevant statute afforded an executive official an opportunity to make a decision in his or her personal judgment. *See United States v. George S. Bush & Co.*, 310 U.S. 371 (1940) (finding unreviewable a decision to approve certain tariffs under a statute that provided the President could do so "if in his judgment such rates of duty and changes are shown by such investigation . . . to be necessary to equalize such differences in costs of production").

2. In 1946, the Administrative Procedure Act ("the APA") was passed. The APA was a compromise between supporters and opponents of the New Deal, one that was "hard-fought . . . [and] left many legislators and interest groups far from completely satisfied." George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996); *see* Martin Shapiro, *APA: Past, Present, & Future*, 72

VA. L. REV. 447, 452-53 (1986). One consequence of this compromise is that the APA's text points in conflicting directions on the issue of agency discretion and judicial review. *See id.* at 454; Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 695 (1990). On the one hand, Section 701(a)(2) announces that the APA's judicial review chapter does not apply to "agency action committed to agency discretion by law." On the other, Section 706(2)(A) specifically permits judicial review of agency action for, among other things, "an abuse of discretion."

As a result, one cannot read the command of Section 701(a)(2) as literally denying review to the range of agency actions that involve some discretion, because that interpretation would render Section 701(2)(A)'s review for "an abuse of discretion" a nullity. As such, "the need for a restrictive, and perhaps artificial, reading of the phrase 'committed to agency discretion' has been universally acknowledged since the earliest days of the APA." Levin, *Understanding Unreviewability*, at 695.

3. The legislative history of Section 701(a)(2) provides few answers. Both the House and Senate committee reports make clear that all agency action can be reviewed for abuse of discretion, seemingly rendering Section 701(a)(2) meaningless. *See id.* at 696. In particular, both reports suggest that Section 701(a)(2) simply restates "the truism that, when an agency has been granted broad discretionary powers, its actions are likely to be lawful and therefore

immune from judicial reversal." *Id.* This is not, however, an argument for no judicial review; it is, instead, an argument that certain actions will always survive judicial review.

4. The tension between 701(a)(2)'s text and its legislative history led to an epic scholarly debate. Professor Raoul Berger, drawing on the APA's legislative history, argued that Section 701(a)(2) did not render any agency action unreviewable. On the other side, Professor Kenneth Culp Davis, echoing the Attorney General's position, claimed that there were indeed actions that were unreviewable under Section 701(a)(2). *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE APA 94 (1947) (Section 701(a) was intended "to restate the existing law as to the area of reviewable agency action"). *See generally* Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 966 n.9 (1969) (noting eight prior installments in the debate, four by Professor Berger and four by Professor Davis).

Despite the many years that have passed since Berger and Davis' debate, this Court has decided only a handful of cases that attempt to explain and apply the section.

5. In this case, Petitioner Ochoa seeks review of the Eighth Circuit's refusal to review the Board of Immigration Appeals' ("BIA's") denial of her motion to reopen her case. The Eighth Circuit's decision cites a prior decision of the circuit, *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008), in which the court

concluded that a decision like the one made here "'is committed to agency discretion by law' [under Section 701(a)(2)] and is thus unreviewable by an appellate court." Petn. App. 6a-7a. The court explained:

> When a plaintiff complains about an action that is committed to agency discretion by law, it does not mean that a court lacks subject matter jurisdiction over the claim. Instead, it means that there is no law to apply because the court has no meaningful standard against which to judge the agency's unfettered exercise of discretion.

Id. at 7a-8a. It is this question, the scope of Section 701(a)(2)'s exception, on which Petitioner seeks this Court's review.

SUMMARY OF ARGUMENT

This Court has given conflicting interpretations of Section 701(a)(2)'s "committed to agency discretion" exception from judicial review. The exception has long been the source of great debate among commentators, and it continues to confound the lower courts. Amici Curiae urge this Court to grant certiorari in this case in order to provide much-needed guidance on the proper interpretation of this exception.

ARGUMENT

I. This Court's "Committed to Agency Discretion" Precedent Has Provided Conflicting Signals as to Section 701(a)(2)'s Scope

In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), this Court established a presumption of reviewability under the APA: "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141. As a result, agency actions that qualified for the APA's exceptions to judicial reviewability, including unreviewability under Section 701(a)(2), were rare.

This Court construed Section 701(a)(2) in light of that presumption in a few brief sentences in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). There, the Court ruled that the Secretary of Transportation's decision to fund a highway through a park

> does not fall within the exception for action "committed to agency discretion." This is a very narrow exception. The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

Id. at 410 (footnote and internal citation omitted).

Two important lessons emerged from *Overton Park*. First, the Court held that Section 701(a)(2)'s exception is "very narrow." Second, the Court opted for an interpretation that followed the "truism" noted in the legislative history: When an agency acts under a broad mandate, its actions will necessarily survive review.

Several commentators have remarked on the difficulty of applying *Overton Park*'s "no law to apply" test. *See, e.g.*, PIERCE, §17.6, at 1593-95. As Professor Levin has observed, this test might better be characterized as the futility theory: "[A]n action should be deemed 'committed to agency discretion' if judicial review would be infeasible and therefore futile." Levin, *Understanding Unreviewability*, at 707. The futility theory may make sense when the inquiry is "whether the agency used legally relevant factors in exercising its discretion." *Id.* If there are no "factors" for the agency to apply, a court cannot conduct this inquiry. *See id.* at 707-08. It does not make sense, however, when another theory supplies the content of abuse of discretion review, such as that "the agency misunderstood the facts, . . . departed from its precedents without a good reason, . . . did not reason in a minimally plausible fashion, or . . . made an unconscionable value judgment." *Id.* at 708.

The acknowledged shortcomings of the "no law to apply" test did not, however, lead to its demise. Instead, during this time, the Court reaffirmed its presumption in favor of judicial review but added nothing to the *Overton Park* test. *See Dunlop v.*

Bachowski, 421 U.S. 560, 567-68 (1975) (allowing review of agency decision not to bring an action against a union).

In light of these developments, some circuit courts attempted to follow the literal terms of *Overton Park* by denying judicial review whenever the statute was viewed as too broad to provide any guidance on its application. *See Jaymar-Ruby, Inc. v. FTC*, 651 F.2d 506, 510-13 (7th Cir. 1981) (finding agency action committed to discretion when the statutory language permitted "the Commission [to] disclose such information . . . to any officer or employee of any State law enforcement agency upon the prior certification . . . that such information will be maintained in confidence and will be used only for official law enforcement purposes"); *Greater New York Hosp. Ass'n v. Mathews*, 536 F.2d 494, 497-98 (2d Cir. 1976) (holding unreviewable agency action on timing of payments because the statute said that "provider[s] of services shall be paid, at such time or times as the Secretary believes appropriate (but not less often than monthly)").

Other circuits, by contrast, eschewed that approach in favor of the First Circuit's pre-*Overton Park* decision in *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970). In *Hahn*, the First Circuit embraced a pragmatic approach, based largely on Professor Harvey Saferstein's study identifying factors courts had relied on when applying Section 701(a)(2). *See id.* at 1249 (citing Harvey Saferstein, *Nonreviewability: A Functional Analysis of 'Committed to Agency Discretion,'* 82 HARV. L. REV. 367 (1968)). The D.C. Circuit, in fact,

equated *Overton Park*'s "no law to apply" test with this pragmatic test. *See Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979) ("In practice the determination whether there is 'law' to apply necessarily turns on pragmatic considerations as to whether an agency determination is the proper subject of judicial review.").

By 1985, the circuit courts were deeply divided on the test for Section 701(a)(2). *See* Levin, *Understanding Unreviewability*, at 711. This Court then granted certiorari in *Heckler v. Chaney*, 470 U.S. 821 (1985), a decision out of the D.C. Circuit that then-Judge Scalia had criticized for failing to follow the *Overton Park* test. *See Chaney v. Heckler*, 724 F.2d 1030, 1030-31 (D.C. Cir. 1984) (Scalia, J., dissenting from denial of rehearing en banc).

In *Heckler v. Chaney*, eight death row prisoners wrote the Food and Drug Administration asking the agency to begin enforcement actions against prison officials who were using lethal drug injections in a manner that they alleged was inconsistent with the Food, Drug, and Cosmetic Act. When the agency refused, the prisoners sought judicial review of the decision not to enforce. *See* 470 U.S. at 823.

The Court began its opinion by noting that "[t]his Court has not had occasion to interpret this second exception in §701(a) in any great detail." *Id.* at 828. The Court then again endorsed the *Overton Park* test:

> [E]ven where Congress has not affirmatively precluded review, review is not to be had if

> the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in §706 – if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for "abuse of discretion."

Id. at 830.

The Court, however, did not end its analysis there. Instead, it turned to various practical factors that explained the "general unsuitability for judicial review of agency decisions to refuse enforcement." *Id.* at 831. These include (1) a concern about interfering with an agency's "proper ordering of its priorities," (2) the lack of an "exercise [of an agency's] coercive power over an individual's liberty or property rights," which would implicate areas that the courts normally protect, (3) the lack of a focus for judicial review because we do not ultimately know what the agency would or would not have done had it acted, and (4) the parallel to prosecutorial discretion, the exercise of which has long been recognized as unreviewable except in very limited circumstances. *Id.* at 832. Given these several factors, it appeared that the *Heckler* Court was creating a complex test for Section 701(a)(2) that went beyond *Overton Park*. Unfortunately, it was

not clear how all these factors should fit together, nor how they would be reconciled with the "no law to apply" test in future cases.

In 1987, the Court decided *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 ("*BLE*"), which seemed to continue *Heckler*'s project by embracing a more functional test for applying Section 701(a)(2). Indeed, in holding that the agency's denial of reconsideration was unreviewable, *BLE* did not mention *Overton Park*'s "no law to apply" test. Instead, it pointed to several factors – including the difficulty of reviewing denials made without a statement of reasons, and the difficulty of devising standards of review for these cases – as the basis for finding the agency's action unreviewable. *See id.* at 282-84.

The Court's next major unreviewability case was *Webster v. Doe*, 486 U.S. 592 (1988). There, the Court held that the decision to discharge an employee from the Central Intelligence Agency was unreviewable except to the extent that the employee sought review of alleged constitutional violations. Unlike *BLE*, however, *Overton Park*'s "no law to apply" test was front and center in the Court's discussion. *See id.* at 599-600 ("We noted that, under §701(a)(2), even when Congress has not affirmatively precluded judicial oversight, 'review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" (quoting *Heckler*, 470 U.S. at 830)).

Justice Scalia, the author of *BLE*, argued in dissent that the Court's treatment of Section 701(a)(2) missed the mark: "The 'no law to apply' test can account for the nonreviewability of certain issues, but falls far short of explaining the full scope of the areas from which the courts are excluded." *Webster*, 486 U.S. at 608 (Scalia, J., dissenting). He then suggested that Section 701(a)(2) was "intended to refer to 'the "common law" of judicial review of agency action,'" *id.* (quoting *Heckler*, 470 U.S. at 832), and that there were a variety of traditional reasons that ought to be considered when determining unreviewability under Section 701(a)(2). These include "whether the decision involves a sensitive and inherently discretionary judgment call, whether it is the sort of decision that has traditionally been nonreviewable, and whether review would have disruptive practical consequences." *Id.* at 609 (citations and internal quotation marks omitted). Justice Scalia then chided the Court for its continued reliance on *Overton Park*: "All this law, shaped over the course of centuries and still developing in its application to new contexts, cannot possibly be contained within the phrase 'no law to apply.' It is not surprising, then, that although the Court recites the test it does not really apply it." *Id.* at 610.

The decision in *Webster* might have been based, as Professor Jack Beermann has suggested, on "the pre-APA understanding that judicial review is not available when a statute grants discretion in terms of personal judgment of an official." Jack M. Beermann, *Common Law and Statute Law in Administrative*

Law, 63 ADMIN. L. REV. 1, 8 (forthcoming Mar. 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1340513. This kind of "deeming clause" was at issue in *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940), which was cited in the influential Attorney General's Manual on the APA as an example of when Section 701(a)(2) applies. *See* ATTORNEY GENERAL'S MANUAL ON THE APA at 94.

Justice Scalia's pointed critique in *Webster*, however, seemed to have an impact. In *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993), the Court concluded that the Director of Indian Health Service's decision to end a program was unreviewable under Section 701(a)(2). In so concluding, the Court weighed heavily the importance of leaving the management of agency resources and priorities to the agency: "[A]n agency's allocation of funds from a lump-sum appropriation requires 'a complicated balancing of a number of factors which are peculiarly within its expertise': whether its 'resources are best spent' on one program or another; whether it 'is likely to succeed' in fulfilling its statutory mandate; whether a particular program 'best fits the agency's overall policies'; and, 'indeed, whether the agency has enough resources' to fund a program 'at all.'" *Id.* (quoting *Heckler*, 470 U.S. at 831)); *see* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 21 (2008). The more categorical approach to Section 701(a)(2) announced in *Lincoln* – "over the years, we have read §701(a)(2) to preclude judicial review of certain categories of administrative decisions that

courts traditionally regard as 'committed to agency discretion,'" 508 U.S. at 191 – seemed to indicate, despite the Court's claim to the contrary, a new take on Section 701(a)(2). The Court, however, has yet to elaborate much on what these categories might be, or how we might figure them out.

Instead, the most significant recent case discussing the limits of reviewability provided a new set of factors to consider. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court held that an agency denial of a rulemaking petition could be reviewed, albeit it under a "highly deferential" standard. *Id.* at 527. In so concluding, *Massachusetts* seemed to embrace *Lincoln*'s more functional or categorical approach to Section 701(a)(2), rather than the "no law to apply" test. It noted that "[a]s we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Id.* The opinion then held that, despite this presumption, "[i]n contrast to nonenforcement decisions, agency refusals to initiate rulemaking 'are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.'" *Id.* (quoting *American Horse Protection Ass'n, Inc. v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987)).

Taken as a whole, then, this Court's precedent seems to be trending away from sole reliance on *Overton Park*'s "no law to apply" test. Indeed, although the Court often cites *Overton Park*, it has strained to include within that test cases that might

better be explained on other grounds, such as personal judgment clauses, or as Professor Beermann has called them, "deeming clauses." *See* Beermann, *Common Law*, at 7-8. The Court's more recent cases have also articulated several factors and even categories that are important to determining whether Section 701(a)(2) applies – such as not wanting to interfere in resource allocation decisions or get involved in sensitive subject areas such as national security and military affairs – but the Court has yet to fill in many details. As such, it is unclear whether these factors and categories are exclusive – or where we might look to discover more such factors and categories. In simplest terms, there is no clear, coherent framework for evaluating claims of unreviewability under Section 701(a)(2). As a result, there is a state of confusion in the lower courts as to when Section 701(a)(2) applies.

II. Lower Courts' Confusion Concerning Section 701(a)(2) Has Far-Reaching Implications

As Petitioner has detailed, there is a great deal of confusion regarding whether the BIA's denial of a motion to reopen *sua sponte* is not reviewable at all under Section 701(a)(2), as the Eighth Circuit held in this case, or whether there might be review to the extent the agency addressed or applied a legal rule, as other circuits have held. *See* Petn. 16-19. The Eighth Circuit's approach to reviewability here clearly illustrates the continuing confusion over whether courts must follow *Overton Park*'s test – and the need for additional guidance from this Court.

The disagreement between the majority and dissent in *Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008) (en banc) – the decision that bound the panel decision this case – was, at bottom, a disagreement over the futility theory. The majority concluded that the statute at issue provided "no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 1003 (internal quotation marks and citation omitted). The dissent disagreed and noted that, because the standard of review was so deferential, "it may very well be that most BIA decisions that provide some reasons for not reopening will be summarily upheld. The critical factor, however, is that review is proper." *Id.* at 1006-07 (Beam, J., dissenting).

A recent Ninth Circuit case has suggested that the issue of review of *sua sponte* decisions ought to be reconsidered after this Court's recent decision in *Kucana v. Holder*, 130 S. Ct. 827 (2010):

> The overall thrust of *Kucana* suggests that sua sponte reopening should be subject to review. There is a longstanding tradition of judicial review of reopenings in immigration cases; there is no statute suggesting review is not available; there is a presumption favoring review; and there is a separation-of-powers concern against giving the Executive authority to withhold cases from judicial review.

Mejia-Hernandez v. Holder, 2011 WL 240357, at *4 (9th Cir. 2011). Notably, this explanation of why *sua*

sponte denials might be reviewable utilizes factors similar to those the Court has suggested are appropriate in its more recent Section 701(a)(2) cases, rather than the "no law to apply test."

The range of tests that have been applied by the circuits when applying the Section 701(a)(2) exception is as varied as the Court's tests. Many, however, have drawn on the Court's more recent articulated factors rather than the "no law to apply" test.

For example, in *Cody v. Cox*, 509 F.3d 606 (D.C. Cir. 2007), the court concluded that an action to compel the military to provide "high quality and cost-effective health care" was reviewable. *Id.* at 610. The court began by noting that the agency action at issue did not qualify for "one of the narrow categories" that satisfies the "strictures" of 701(a)(2). *Id.* "This case does not involve second-guessing executive branch decisions involving complicated foreign policy matters. Nor does it relate to an agency's refusal to undertake an enforcement action, or its determination about how to spend a lump-sum appropriation." *Id.* (citations and internal quotation marks omitted). The court then turned to the statutory language and concluded broadly that, "hav[ing] regularly found Congress has not committed decisions to agency discretion under far more permissive and indeterminate language," the action was reviewable. *Id.*

Likewise, in *Merida Delgado v. Gonzales*, 428 F.3d 916 (10th Cir. 2005), the court held unreviewable the Attorney General's decision not to permit aliens to

receive flight training due to a risk to aviation or national security. In so holding, the court focused on the nature of the risk at issue, concluding that "a judgment concerning aviation or national security must be made by those with the necessary expertise," and "[i]t is rarely appropriate for courts to intervene in matters closely related to national security." *Id.* at 920.

Moreover, the variety of tests that have been applied in the Section 701(a)(2) context has resulted in conflicting outcomes on whether particular agency actions are reviewable. Illustrative is the split on whether a decision to use a single BIA member for "streamlined" review of initial immigration decisions is reviewable. *Compare Tsegay v. Ashcroft*, 386 F.3d 1347, 1353 (10th Cir. 2004) (not reviewable) and *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004) (same), *with Smriko v. Ashcroft*, 387 F.3d 279, 294 (3rd Cir. 2004) (reviewable) and *Chong Shin Chen v. Ashcroft*, 378 F.3d 1081, 1087 (9th Cir. 2004) (same). In concluding that the single-member review was not judicially reviewable, the Tenth Circuit, which was also summarizing the Eighth Circuit's conclusion, pointed to three factors: "(a) that the application of [the relevant rule] involves the complex allocation of agency resources, (b) that it was not intended to create substantive rights for aliens, and (c) that judicial review would have disruptive practical consequences and would be unworkable in any case." *See Tsegay*, 386 F.3d at 1356 (citing the Eighth Circuit's decision in *Ngure*, 367 F.3d at 983-85). The Third and

Ninth Circuits, in contrast, looked to whether there is law to apply in the more traditional sense and found that the language in the statute provided criteria that cabins the BIA's discretion, thus making the decision reviewable. *See Chong Shin Chen*, 378 F.3d at 1088; *Smirko*, 387 F.3d at 292-93.

Finally, the confusion over Section 701(a)(2)'s contours for determining whether an action is unreviewable has also led to tension with the nondelegation doctrine's "intelligible principle" requirement. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *cf. Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly and courts have upheld such delegation because there is court review to assure that the agency exercises the delegated power within statutory limits. . . ."). In *South Dakota v. Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated, Department of Interior v. South Dakota*, 519 U.S. 919 (1996), the Department of the Interior acquired commercial land that was to be held in trust for the Lower Brule Tribe of Sioux Indians. *Id.* at 880. When the City and State sought review of the Secretary's decision, the Secretary claimed, among other things, that his decision was unreviewable under Section 701(a)(2). *Id.* The Eighth Circuit concluded instead that the statute was so broad that it violated the nondelegation doctrine. *See id.* at 885. This Court later vacated that decision when the Department changed its position and agreed that judicial review

was, in fact, available. *See Department of Interior v. South Dakota*, 519 U.S. 919, 920 (1996) (Scalia, J., dissenting).

Without a coherent approach for determining whether an agency action falls under Section 701(a)(2), lower courts will continue to be inconsistent in their application of the exception, which will perpetuate conflict and confusion. This Court's further guidance on the appropriate test is needed.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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